85-766

No.

Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdictional Statement

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QUESTIONS PRESENTED

Where the state creates, regulates, and with its towns finances state primaries, and also grants automatic and preferential access on the general election ballot to the primary winners,

1. Does a state statute which requires only that a person belong to a political party in order to vote in that primary violate the First Amendment of the U.S. Constitution solely because a party adopts a conflicting rule?

2. Does a party rule which provides, contrary to state law, that unaffiliated persons may vote in some, but not all, state primaries undermine the State's responsibility to set voter

qualifications and regulate elections under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments of the U.S. Constitution?

3. Does the party rule also violate Art. I, § 2, and the Seventeenth Amendment because it discriminates in voter qualifications for Congressional elections as compared to those for the State Legislature?

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Jurisdictional Statement

OPINIONS BELOW

The opinion of the Court of Appeals, App., 1-141,* is reported at 770 F.2d 265 (1985). The original opinion of the District Court is at App., 142-213. An edited version of that opinion is reported at 599 F.Supp. 1228 (1984).

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Second

* Hereafter, App. is utilized to refer to the separately bound appendices filed with this Jurisdictional Statement.

Circuit holding invalid under the U.S. Constitution § 9-431, Conn. Gen. Stats., relied on by the appellant, which provides that one must belong to a political party to vote in that party's primary elections.

Federal jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). Judgment was entered August 8, 1985. App., 214-16. A notice of appeal to this Court was filed in the Court of Appeals for the Second Circuit on September 20, 1985. App., 217-21.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Art. I, §§ 2 and 4, the First, Tenth and Seventeenth Amendments to the Constitution, § 9-431, Conn. Gen. Stats., and other provisions of Ch. 153, Parts I, II and III A., Conn. Gen. Stats., set forth in App., 222-238.

STATEMENT OF THE CASE

Conn. Gen. Stats. § 9-431 requires that persons be members of a political party to vote in that party's primary election. The plaintiffs, however, rely on a party rule which would, contrary to statute, allow unaffiliated voters to

vote in Republican primaries for United State Senators, members of the United States House of Representatives, Governor and certain state executive officers. It would not apply to other offices such as positions in the State legislature.

The rule is that of a state, rather than a national, party convention. Cf. Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981) (involving a national party convention). It deals with state and local primaries and not presidential ones. App., 251-2.

In 1955, the Connecticut General Assembly enacted a challenge primary law.

§ 9-400 Conn. Gen. Stats. That law allows a candidate who obtains 20% or more of the convention vote to wage a primary for the nomination against the convention winner.

As part of that comprehensive primary election system, party enrollment is required in order to vote in a party's primary. The statute was passed after extensive debate, with the Assembly aware of the various primary alternatives. See 6 Conn. Sen. Proc., Pt. 11 (1955 Nov. Sp. Sess.), p. 542.

The Connecticut primary election system provides for automatic and

preferential ballot access for major parties. §§ 9-379, 9-249a, Conn. Gen. Stats. The primary is financed by public funds. See, e.g., §§ 9-436, 9-441, Conn. Gen. Stats. Party enrollment, furthermore, requires only that one fill out a short form up to one day before the primary. Conn. Gen. Stats. § 9-56; Conn. P.A. 84-118.

In 1976, the same law invalidated in this case was upheld in Nader v. Schaffer, 417 F.Supp. 837 (D.Conn. 1976, three- judge court), aff'd mem., 429 U.S. 989 (1976).

Raising The Federal Questions

The questions sought to be reviewed were raised by appellant in the District Court by Motions to Dismiss, filed June 15, 1984, and July 24, 1984, as well as by an Objection to Summary Judgment, filed July 24, 1984. The motions were denied on July 6, 1984, and December 5, 1984. Summary judgment for plaintiffs was granted on December 5, 1984. The questions were also raised by appellant in the Court of Appeals in the issues and argument portions of her brief. The questions concerning the State's regulatory responsibility and discretion

for elections and voter qualifications under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments were not directly addressed by the Court of Appeals.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Court of Appeals makes state laws regarding election administration subject to the acquiescence or veto of a political party, notwithstanding legitimate state interests to the contrary. Under the holding and logic of the Court of Appeals, many of the election laws of all of the states could be invalidated any

time a political party adopts an inconsistent rule.

The Court of Appeals itself acknowledged that this case has "far-reaching implications... for primary elections in particular and the two-party system in general...." App., 33-4 n.10. The District Court did the same. App., 198 n.1.

The opinion of the Second Circuit conflicts with this Court's affirmance in Nader, supra, which upheld the very law struck down below. The decision also improperly extends this Court's opinion in Democratic Party of the United States

v. Wisconsin, supra. Democratic Party involved an attempt by a state to regulate the convention of a national party; it did not involve -- nor did it ever question -- the authority of a state to regulate participation in its own state-financed primary elections.[1/]

Moreover, the Court of Appeals grossly misapplies Roberts v. United

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1/ See dissent from the dismissal of appeals in Bellotti v. Connolly, et al., ____U.S.____, 103 S.Ct. 1510 (1983), (Stevens,J., joined by Rehnquist, J., and O'Connor, J.), contrasting state regulation of a nation-wide contest with state regulation of elections for state-wide office.

States Jaycees, ____U.S.____, 104 S.Ct. 3244 (1984), to reach its remarkable conclusion that a major political party resembles an intimate human relationship. The unprecedented conception of First Amendment political associational rights announced by the Second Circuit must be set aside by this Court "if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).

In addition, the opinion of the Court of Appeals retreats significantly from United States v. Classic, 313 U.S. 299 (1941), by substantially narrowing

the voting rights protections afforded by Art. I, §§ 2 and 4, of the Constitution.

The issue in this case is not whether open or closed primaries better promote the goals of effective, responsible and democratic government in a state; that decision was made, as it must be, by Connecticut's popularly elected state officials. The issue, instead, is what role the States have under the Constitution to regulate primary elections, and what the correct standard of review is for First Amendment challenges to state elections laws.

Because of the far-reaching implications of the decision, the misreading of several critical opinions of this Court, and pending elections schedules throughout the nation, it is essential that the questions raised by this case be resolved now.

I. A State Law Regulating State Primaries Does Not Violate Associational Rights Simply Because A Political Party Adopts A Conflicting Rule.

A. The Court Erred In Treating A Major Political Party Like An Intimate Human Relationship.

The Court of Appeals gave party rules a practical veto over state election laws by comparing political activity to "'certain intimate human

relationships.'" App.,72. The court stated that these relationships, such as marriage, raising and educating children and cohabitation with relatives, under Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984), had to be protected from "'undue intrusion by the State....'" App.,72. The court included as part of "that select group of intimate relationships and bonds" support of a candidate for election. App., 73-4. This fundamental misapplication of Roberts places virtually all electoral laws and regulations in jeopardy of constitutional challenges that never before would have been recognized.

In Roberts, supra, the Supreme Court held that the Jaycees were neither small nor selective and lacked the distinctive characteristics that would entitle them to special constitutional protection. 104 S.Ct. at 3251. It was only with truly intimate groups that freedom of association was an "intrinsic element of personal liberty." Id. at 3250-3251. The two Jaycees chapters in Roberts had together fewer than 900 members. The Court of Appeals found that there were 477,749 Republicans in Connecticut. App., 21 n.4. There is absolutely nothing in the record showing that the Connecticut Republicans, a major

political party, controlling both houses of the Connecticut legislature and one half of the State's Congressional delegation,[2/] are small and selective. Nor could this be so when any elector may enroll in that party by filling out a simple form that requires no affirmation of loyalty. Conn. Gen. Stat., §§ 9-55, 9-56, 9-57. In fact, major political parties are recognized as powerful groups which "seem imbued with a quasi-governmental character." L. Tribe, American Constitutional Law 787 (1978).

2/ Conn. State Register and Manual 1985, pp. 119-133, 179, 181.

The three-judge court which upheld the identical statute struck down by the Court of Appeals stated that major party nominations were regulated in detail because "the State is particularly concerned with the parties which have demonstrated some probability of success in the gen al election and whose candidates ay become holders of public office." Nader v. Schaffer, supra, at 843. The nominations of these parties are "so important to the ultimate selection of governmental leaders." Id.

Unless the ruling of the Court of Appeals that a major political party

resembles an intimate human relationship is reversed, many important state election laws will be subject to automatic challenge with the passing fancies of political party conventions.

B. The Court Misapplied Principles Concerning A National Convention To A State Party Primary.

The Court below incorrectly relied on Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981). App., 92-7. That decision dealt with a national, not a state, party. Its application in this case threatens a vast number of election laws in all the States.

The vital distinction between state laws regulating a state party as opposed to a national one was recognized in the dissent by Justice Stevens, joined by Justices Rehnquist and O'Connor, from the dismissal of the appeals in Bellotti v. Connolly, et al., supra, 103 S.Ct. 1510 (1980). That dissent states that, "unlike Wisconsin's attempt to control delegates in a nationwide party contest, the Massachusetts rule applies to campaigns for statewide office." Id. at 1513.

In Democratic Party, this Court explicitly stated the issue to be

"whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." Id. at 121 (emphasis added). The Court found that "[i]t is for the National Party--and not the Wisconsin Legislature or any court--to determine the appropriate standards for participation in the Party's candidate selection process." Id. at 124 n. 27 (emphasis added).

Moreover, the Court in Democratic Party stated that Cousins v. Wigoda, 419 U.S. 477 (1975), which it found controlling, was decided "'in the context

of the selection of delegates to the National Convention.'"450 U.S.at 121.[3/]

The improper application of Democratic Party by the Court of Appeals will have a profound effect on state election laws unless the judgment below is reversed.

3/ In Cousins the Court stated that selection of delegates to national conventions could not be left to the law of each state: "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves coalitions cutting across state lines." Id. at 490. "[T]he pervasive national interest" had to prevail. Id.

C. The Court Improperly Used A Severe Standard Of Review That Preordains The Unconstitutionality Of Many State Election Laws.

Because of its unprecedented perception of the First Amendment issues implicated in this case, the Court of Appeals subjected the statute to "strict judicial scrutiny." App., 112. This made it almost impossible to defend the law's constitutionality. If strict scrutiny is appropriate in the context of the de minimis associational rights actually affected in this case, myriad election laws of all the states are now subject to a new form of challenge.

The opinion below contravened principles of review repeatedly emphasized by this Court for election cases. See, e.g., Anderson v. Celebreeze, ____U.S.____, 103 S.Ct. 1564, 1570 (1983); Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8, 13-14 (1982) (a unanimous opinion by the Chief Justice employing a "not unreasonable" standard in upholding an election statute against a substantial constitutional challenge); Storer v. Brown, 415 U.S. 724, 729 (1974); Bullock v. Carter, 405 U.S. 134, 143 (1972). As the three-judge court said in upholding this very statute,

> 'Not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' [citations omitted]... It has never been suggested that [the rule of these decisions] automatically invalidates every substantial restriction on the right to vote or to associate.' (Emphasis supplied.)

Nader v. Schaffer, supra, at 848-9.

The constitutionality of election laws should never be be judged so rigidly and mechanically. Instead, "the character and magnitude" of the alleged constitutional injury must be considered. Anderson v. Celebreeze, supra, 103 S.Ct. 1564, 1570 (1983). Then the precise interests of the State must be identified and evaluated. This includes "the

legitimacy and strength" of each state interest. A decision is to be reached "[o]nly after weighing all these factors." Id. As this Court stated, "the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions." Id. at 1569-70. The Anderson decision was neither followed nor acknowledged by the Court of Appeals. Instead, it elected to apply its own, and unprecedented test, and one which few state election statutes could survive when challenged by a political party.

Although the court below discussed the interests of the party and state, it placed an insuperable burden on Connecticut when it subjected the statute to strict scrutiny and held that it could only be justified by a compelling state interest. App., 112. This approach conflicts with that taken repeatedly by this Court and by other circuits. See, e.g., Anderson v. Celebreeze, supra; Storer v. Brown, supra; Baer v. Meyer, 728 F.2d 471 (10th Cir. 1984); Dart v. Brown, 717 F.2d 1491 (5th Cir. 1983). 4/

4/ In Dart v. Brown, the Fifth Circuit, in referring to American Party of

(footnote cont'd)

The proper test should be whether the state law "'unfairly or unnecessarily burdens "the availability of political opportunity."'" Anderson, supra at 1572.

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> Texas v. White, 415 U.S. 767 (1974) and Storer v. Brown, supra, stated: "[W]e believe Professor Tribe fairly characterizes these two opinions as a whole in stating that: '... each actually assayed the requirements by a far less demanding standard. In particular, the Court in several instances did not require whether a less restrictive alternative would adequately protect the state's interests.... The standard of review actually applied, therefore, seems to have been a mix of strict and minimal scrutiny.' L.Tribe, American Constitutional Law (1978), 783." 717 F.2d 1491, 1503.

1. The Interests Of The State Are Substantial And Were Substantially Ignored.

The interests of the State in this case are perhaps best stated by the three-judge district court that upheld the same statute:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing

> fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 Rutgers L.Rev. 298 (1974), and Comment, 40 U.Chi.L.Rev. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as Rosario v. Rockfeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); and American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

417 F.Supp. at 845 (emphasis added). 5/ As previously noted, this Court affirmed that decision.

5/ Appellee Weicker also participated in that case, then as amicus curiae. Id. at 849-50.

Similarly, a different three-judge district court upheld the requirement of 20% of the convention vote for a primary because "[t]he State does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F.Supp. 513, 517 (D.Conn. 1970, Clarie, J., three-judge court) (emphasis added).

When the usefulness of the party system is seriously impaired, "[i]n the end, the chief loser would be the public." Rosario v. Rockfeller, 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S.

752 (1973). The Connecticut legislature had abundant evidence to support its concern that "open primaries" reduce the meaning of the party label. Insofar as this "weakens the party ties of elected officials, the result hardly enhances the functioning of democracy." D.Price, Bringing Back the Parties 132 (1984).[6/]

6/ See also Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1168-9 (1975) (identifying four state interests which justify party affiliation requirements for primaries); American Political Science Association, Toward a More Responsible Two Party System 71 (1950) ("The closed primary deserves preference because it is more readily compatible with the development of a responsible party

(footnote cont'd)

The Court of Appeals substantially ignores certain essential facts. The elections at issue were created not by the parties, but by the State. They are financed by the public. See, e.g., §§ 9-436, 9-436a, 9-441, Conn. Gen. Stats. The State grants the nominees of major political parties automatic ballot

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system".); V.O. Key, Politics, Parties and Pressure Groups 392 (15th ed. 1964); J.M. Burns, The Power to Lead 222 (1984); D.Lockard, Politics of State and Local Government 194 (1963); J. White, The Fractured Electorate 104 (1983); M. Jewell, Parties and Primaries, Nominating State Governors 292 (1984).

access. It also grants them preferential ballot access over the candidates of minor and petitioning parties. §§ 9-249a, 9-379, Conn. Gen. Stats. All these privileges, granted at taxpayer expense, are keyed to the party label.

In return, the public--speaking through its elected representatives-- has a right to ensure that the nomination carrying the major party label is in fact the nomination of members of that party. As stated in Rodriquez v. Popular Democratic Party, 457 U.S. 1 (1982): "The methods by which the people of Puerto Rico and their representatives

have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.... Absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its 'special concerns and political circumstances....'" Id. at 8, 13-14.

2. The Interests Of The Party Were Grossly Inflated By The Court of Appeals.

Despite its extraordinary rhetoric, the Court of Appeals never subjected the interests asserted by the appellees to serious analysis. If the Court of Appeals' cursory form of review is not

set aside by this Court, parties will have a veritable veto over considerable portions of the states' electoral codes.

An examination of the party's putative associational interests demonstrates that those interests are de minimis. The party is free to adopt whatever philosophy it wants and to send any message to the voters that it chooses. Nothing prevents it from polling unaffiliates and considering their desires. Nothing prevents it from enrolling unaffiliates as members if the unaffiliates agree.

In addition, nothing prevents a party from soliciting financial or volunteer support from unaffiliates in a primary, or votes at a general election. Absolutely nothing prevents a major party from nominating candidates with bipartisan and independent appeal, if the party so desires.

In fact, one may enroll with a party up to twelve noon the last business day before a primary to vote in that primary. Conn. Public Acts 84-118. This is an absolutely minimal limitation compared to the eight and eleven month enrollment cut off dates that were upheld by this Court

as legitimate in Rosario v. Rockefeller, supra. It simply defies reason that there could be a greater associational injury when a political party is prevented from having people vote in its primaries who voluntarily elect not to affiliate with that party than when a person is prevented from voting in an election because of his failure to meet such deadlines. And the present law does not even begin to compare with the statutes in Williams v. Rhodes, 393 U.S. 23 (1968), cited by the Court of Appeals (App., 79-82), which made it virtually impossible for a new party to be placed on the ballot.

In fact, the Court of Appeals acknowledged that the alleged intrusion into the associational rights of the plaintiff party was "not readily apparent", and that "[i]n and of itself, legislative definition of an association's boundaries may not appear to run afoul of the first amendment." App., 99, 101-2. The Court of Appeals made the inapparent apparent because it believed that "the inexorable effect" of the statute under review would be to alter the party's message. App., 102. The court of appeals in Roberts v. Jaycees, supra, had made an analogous assumption that "'some change in the

Jaycees' philosophical cast can reasonably be expected'" if women were admitted. 104 S.Ct. at 3255. This Court, in reversing, condemned this supposition as unsupported by the record. Id. at 3255.

Similarly, there is nothing in the record in this case to substantiate the assumptions of the Court of Appeals. The court stated that the party subcommittee which proposed the plaintiffs' rule had reached certain conclusions. App., 22. A proposed stipulation to this effect, however, was withdrawn in the District Court by mutual consent. App. 249-50,

281-2. The trial court made no such finding. The Court of Appeals simply misread the record. In addition, assertions by the Court of Appeals as to legislative motivation (App., 108-9) are also completely unsupported by the record. Here again, the trial court made no such findings. The same is true of the statement in the court's opinion that the statute had been "enacted by a Democratic controlled state legislature." App. 101. Not only is this devoid of any evidentiary support, it is also incorrect. In the 1955 legislature that passed this law, the Republicans had a two to one majority in the House of

Representatives. Conn. State Register and Manual 1985, p. 180.

D. The Opinion Below Has Far-Reaching Implications Impairing Orderly State Election Administration.

State regulation of elections is needed "'if some sort of order, rather than chaos, is to accompany the democratic processes.'" Anderson v. Celebreeze, supra, 103 S.Ct. at 1569 (quoting Storer v. Brown, supra, at 730). The validity of state election laws cannot depend on the passing fancies of political conventions. A law cannot be valid today because the party acquiesces but become void tomorrow because the party changes its rules.

If a single party may veto the state primary law in this case, than many other election statutes may fall by the same logic.[7/]

7/ These include in Connecticut, the right to a primary by a candidate who receives at least 20% of the convention vote, § 9-400, C.G.S.; the right to a primary to begin with, id.; the right to primary for municipal and certain party offices by obtaining sufficient petition signatures, §§ 9-406, 9-407, C.G.S.; the right to absentee ballots for a primary, ch. 144a, C.G.S.; party enrollment rights provided by law in the face of any conflicting party rules concerning loyalty oaths, test for affiliation, and durational residency requirements, see §§ 9-23a, 9-56, 9-57, C.G.S.

The court's dictum (App. 129-30)

(footnote cont'd)

In addition, even were it not for the implications for other election statutes, the party rule in this case will by itself generate enormous confusion and disorder for election administrators. Different voting qualifications, that would apply unevenly and irregularly to various parties and to

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that the State could simply limit the ability of a party to change its rules does not even begin to address these concerns and is inconsistent with the court's premise of party insulation from state laws. It could also spawn further litigation based on strict scrutiny, and create uncertainty and confusion.

various offices, would have to be enforced.

Moreover, this enforcement would have to be done amidst the pressures and uncertainties that already exist at polling places on primary day. Finally, the administrative burdens would fall largely on part-time moderators, assistant registrars, checkers, machine tenders and absentee ballot counters, most of whom serve at no more than one or two elections a year.

II. The Opinion Below Ignores The Constitutional Role Of The States In Setting Voter Qualifications And Regulating Elections Under Art. I, §§ 2 And 4, And The Tenth And Seventeenth Amendments.

The Court of Appeals stripped several important provisions of the Constitution of contemporary meaning. It essentially ignored those portions of Article I, §§ 2 and 4, and the Tenth and Seventeenth Amendments that empower States to set voter qualifications and regulate elections. In Storer v. Brown, supra, this Court asserted after referring to sections 2 and 4 of Article I, "[i]t is very unlikely that all or even a large portion of the state

election laws would fail to pass muster under our cases...." 415 U.S. at 730. If the decision of the Court of Appeals is not reversed, that will no longer be true.

Under the Constitutional distribution of powers, the States determine voter qualifications for state officers as well as for members of Congress. Storer v. Brown, supra, at 729-730; Katzenback v. Morgan, 384 U.S. 641, 647 (1966) (citing Art. I, § 2 and the Seventeenth Amendment). Moreover, as Justice Black wrote in Oregon v. Mitchell, 400 U.S. 112, 125 (1970):

"[A]rt. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4."

The ruling below to the extent that it glosses over Art. I, §4, thus erodes not only the regulatory authority of the States but of Congress as well.

Just last Term, this Court stressed "the States' 'residuary and inviolable sovereignty,'" recognizing that:

> The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1.

Garcia v. San Antonio Metropolitan Transit Authority, et al., ____U.S. ____, 105 S.Ct. 1005, 1017, 1018 (1985).

Up to now, it has been accepted that "[e]ach state legislature chooses the primary election scheme that it thinks will best prcmote democratic, electoral and governmental goals." Nader v.

Schaffer, supra, 417 F.Supp. at 843. Unless the judgment below is reversed, this legislative discretion protected by the Constitution will be eliminated.

III. The Party Rule Violates Art. I, § 2, And The Seventeenth Amendment Because It Sets Different Voter Qualifications For Congress Than It Does For State Legislature.

The Court of Appeals found it "unnecessary" to decide the meaning of Art. I, § 2, and the Seventeenth Amendment because it held that the voter qualifications clauses did not apply in primaries. App., 41 n. 11. The court thus severed important constitutional protections of voting rights from an

integral part of the election process. This ruling must be reversed if the mandate of this Court in such cases as United States v. Classic, 313 U.S. 299 (1941), is to retain any meaning.[8/]

A party rule must itself be "constitutionally permissible." Democratic Party of the U.S. v. Wisconsin, supra, at 123 n. 25. See also Cousins v. Wigoda, supra, at 491. Art. I, § 2, cl. 1, of the Constitution provides

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8/ The Court of Appeals asserted that this clause "has not been subject to intense judicial scrutiny" and viewed the question "as one of first impression." App., 44, 55.

that "...the Electors [for U.S. House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment includes virtually identical language with respect to electors for the U.S. Senate.

In Oregon v. Mitchell, 400 U.S. 112 (1970),[9/] Justice Stewart, in an opinion

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9/ In that case the 18-year-old minimum age requirement of the voting rights amendments of 1970 was upheld for Presidential and Congressional elections but invalidated for state and local elections. In addition, provisions barring literacy tests in all elections and residency requirements in Presidential elections were sustained.

concurring and dissenting in part, in which the Chief Justice and Justice Blackmun joined, concluded that:

> The Constitution thus adopts as the federal standard the standard which each State has chosen for itself.... Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment....
>
> ...[N]o State may establish distinct qualifications for congressional elections .... [T]he States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature.

Id. at 288-289 (emphasis added) (citations omitted). 10/

10/ Justice Stewart suggested that with respect to state residency

(footnote cont'd)

Under plaintiffs' rule, unaffiliated voters not qualified to vote for State legislative offices in Republican primaries would nevertheless vote for Congress in those primaries. Party membership has been specifically recognized as one of the qualifications for voting under the same law involved here. See Nader v. Schaffer, supra, 417

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> requirements for voting for federal office, Congress might prescribe different qualifications because of powers existing elsewhere in the Constitution. There was no question, however, but that a state was not free to do so. There was no dispute on this point in any of the other opinions in that case.

F.Supp. at 842 n. 4, quoting Smith v. Allwright, 321 U.S. 649, 664 (1944).

That a state primary for Congress is an election under Art. I is today hardly open to question. In United States v. Classic, 313 U.S. 299 (1941), this Court held that Art. I, SS 2 and 4, applied in a primary "where the primary is by law made an integral part of the election machinery...." Id. at 318. That is the case in Connecticut under Parts I, II and III A of Ch. 153, Conn. Gen. Stats.

The Court of Appeals claimed that the qualifications clause was not even discussed in Classic. App., 53-4. Yet

the Classic Court relied upon all of Art. I, § 2, cl. 1, including the qualifications section. After quoting the state regulatory authority for Congressional elections in § 4 of Art. I, the Court then stated that the right to vote was secured by the Constitution "to qualified voters" for the House of Representatives, and was "thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2," as well as § 4. Id. at 310. See also id. at 314, 315. In fact, the decision upheld the rights of voters qualified under state law to have their votes properly counted in a primary. Id. at 308.

The application of the Constitution to primaries was reaffirmed in Smith v. Allwright, 321 U.S. 649 (1944), which held that the duties imposed by state statutes on a party for the selection of its nominees "do not become matters of private law because they are performed by a political party." Id. at 663. This Court concluded:

> The privilege of membersnip in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State. Id. at 664-5.

See also Buckley v. Valeo, 424 U.S. 1, 13-14 n. 16 (1976) (upholding Congress's authority to regulate primaries under Art. I, § 4.)

CONCLUSION

It is therefore respectfully submitted that the questions in this case require full consideration by this Court and that probable jurisdiction should be noted.

Respectfully Submitted

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,
v.
REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix to Jurisdictional Statement
Volume I

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UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 1165 August Term, 1984

(Argued May 16, 1985:Decided August 8, 1985)

Docket No. 85-7011

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REPUBLICAN PARTY
OF THE STATE OF CONNECTICUT,
LOWELL P. WEICKER, JR.,
STEWART B. McKINNEY,
NANCY L. JOHNSON and
THOMAS J. D'AMORE, JR.,

Plaintiffs-Appellees,

-against-

JULIA H. TASHJIAN,
Secretary of the State
of the State of Connecticut,

Defendant-Appellant.

----------x

Before: KAUFMAN, OAKES, and CARDAMONE,
Circuit Judges.

Tashjian appeals from a judgment of

the United States District Court for the District of Connecticut (Cabranes, J.) enjoining the enforcement of Section 9-431 of the Connecticut General Statutes.

Affirmed.

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IRVING R. KAUFMAN, Circuit Judge:

Fascinated by the penchant of Americans to band together and gather strength from association, Alexis de Tocqueville wrote:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, 2 Democracy in America 203 (Bradley, ed. 1954).

It is this ability and propensity of our citizenry to unite and pursue desired goals that form the foundation of American political thought. Indeed, the very existence of this nation stands as a testament to the efficacy of political organization.

The bundle of freedoms bestowed by the first amendment, often perceived as safeguarding the individual from the will of the group, also serves to protect the group against the tyranny of the state. Having just emerged from an impassioned struggle for independence, the framers appreciated that effective political change could best be achieved through

collective activities, and further recognized that the right to associate for political purposes was a natural concomitant of the right to espouse political views.

If our system of government is to remain responsive to the will of the people -- as it must -- the untrammeled freedom to join together in pursuit of political goals must be secured against state intrusion, and our political organizations must retain the freedom to invite into their ranks those citizens with whom they wish to associate.

Mindful of these tenets, we are called upon today to reconcile the tenison between a political party's right to self-determination and a state's interest in regulating primary elections. Specifically, we are faced with a challenge by the Republican Party of the State of Connecticut against a state law that prohibits individuals with whom the party members wish to associate from participating in the party's primary. The district court held that the state-mandated closed primary substantially interfered with Republican Party's right of political association by determining who is eligible to participate in the Party's candidate selection

process. In addition, the court concluded that the interests proffered by Connecticut to support its state regulation were not compelling. For the reasons set forth below, we affirm the judgment of the district court.

Because the legal issues presented in this appeal are framed, to a large extent, by reference to political exigencies, we believe it would prove helpful to set forth the significant aspects of Connecticut's electoral scheme.

I. BACKGROUND

A. Connecticut's Primary Election System

Pursuant to Connecticut law, potential candidates for electoral office are divided into three categories: those representing "major parties," those of "minor parties," and independents (or "petitioning parties").[1/] By virtue of

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1/ A "major party" is one (a) whose candidate in the preceding gubernatorial election received at least twenty percent of the total votes for that office, or (b) whose candidate for the office in question received, at the last preceding regular election for the office, at least ten percent of the total votes. Conn. Gen. Stat. § 9-372(5)(A). A "minor party" is one whose gubernatorial candidate

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its performance in past gubernatorial elections, the Republican Party is a major party. As such, its candidates are automatically accorded space on the general election ballot, while other candidates may have their names place on the

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> received less than twenty percent of the total vote in the preceding election, and whose candidate for the office in question received less than ten percent, but at least one percent of the total vote for that office in the preceding election. Id. § 9-372(6). Independents, or "petitioning parties," are candidates or parties that have qualified for nomination for elective office pursuant to the provisions of §§ 9-453a through 9-453u inclusive, or in instances of nominations for vacancy elections for the offices of state senator or state representative, as provided in § 9-216.

ballot only after fulfilling the petition requirements set forth in §§ 9-453a through §§ 9-453u.[2/] Conn. Gen. Stat. § 9-379.

In 1955, the Connecticut General Assembly enacted a "challenge" primary law, codified as Conn. Gen. Stat. § § 9-372 et seq, which authorized each major party to

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2/ Minor parties nominate candidates in a manner prescribed by the party's own rules, which must be filed with the Secretary of the State. Conn. Gen. Stat. § § 9-452, 9-453. Candidates not nominated by a major or minor party may still appear on the ballot by presenting the Secretary of the State with a petition bearing signatures equal to one percent of the votes cast for the same office at the preceding election. Id. § 9-453d.

select candidates to be nominated for electoral office. Party endorsements are made at state or district conventions, and only enrolled party members may vote to select those delegates who attend the convention. Id. §§ 9-387, 9-390, 9-407. If a candidate is not opposed at the convention, he becomes the party's nominee in the general election and no primary election is held. Id. §§ 9-408. 9-409. A candidate rejected by the convention, however, is eligible to challenge the endorsed candidate in a primary election if he has received on any roll call convention vote at least twenty percent of the votes of the delegates present and voting, and files a document with the

Secretary of the State certifying that he has garnered the requisite vote total. Id. § 9-400. Party primaries are held at the expense of the State, and the primaries for all major political parties in Connecticut are held on the same day, during the same hours and at the same polling places. Separate voting machines are used for each party on primary day.

Mindful of these aspects of Connecticut's primary election apparatus, we turn to the voting eligibility requirements, which constitute the crux of the instant appeal. Section 9-431 of the Connecticut General Statutes provides, in pertinent part:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district . . .

To enroll in a political party, a person must execute an application for enrollment form, requiring him to state his name, address, desired party affiliation, previous party affiliations within the past six months and the date of which he applied to remove his name from the membership list of the political party with which he was previously affiliated. Party enrollment lists are a matter of public record, Id. § 9-55, and Connecticut does not require lists of unaffiliated voters to be available at

the polls on primary day. Connecticut Public Act 84-118, which became effective on January 1, 1985, allows an unaffiliated voter to participate in a party's primary election if he enrolls in that party prior to twelve o'clock noon on the last business day before the primary. Id. §§ 9-56, 9-57. Finally, a voter enrolled in a party may at any time apply to have his name removed from the party's enrollment list, and to transfer to the enrollment list of another party. He may not, however, vote in any primary for six months following the date of his application for transfer. Id. § 9-59.

B. The Republican Party's Challenge to Section 9-431

The Connecticut Republican Party (the "Party") is comprised of individuals who associate for the common advancement of political beliefs and ideas. Its ultimate goal, as stated in the preamble to its Constitution,[3/] is to "seek out,

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3/ The Preamble to the Convention and Committee Rules of the Republican Party of the State of Connecticut provides as follows:

> Among the goals of the Republican Party of Connecticut are to seek out, designate, and secure the election of qualified

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designate, and secure the election of

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candidates for public office at the Federal, State and Local levels of government. The Republican Party believes in each individual's dignity, ability to solve his or her own problems with minimal governmental interference and support, sound fiscal policies which will provide opportunity for all of our citizens.

The Republican Party of Connecticut stands, as it always has, open to all interested persons and offers to them equal opportunities of participation without regard to race, color, creed, sex or national origin.

In its stance as a statewide political organization, dedicated to governmental improvement on all levels, the Republican Party of Connecticut encourages fullest voter participation in its activities and supports the broadest pos-

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qualified candidates for public office at

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sible membership registration.

To achieve the goal of governmental improvement, the Republican Party of Connecticut solicits the ideas, the interest and the participation of all segments -- our young people, our seniors, businessmen and labor. Only by this means can the Republican Party adequately reflect the interests of all the people and work on their behalf. And to this end, the Republican Party is dedicated.

The Republican Party of Connecticut is further pledged, in the interests of fuller voter participation, to conduct its business in public. All party meetings at all levels shall be conducted after sufficient advance notice and in such public places as to invite citizen observation.

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the Federal, State and Local levels of government," who will implement its policies, philosophies and programs. Correlative to this objective, the Party seeks to nominate those candidates who

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> The Republican Party's rules of operation are designed and followed to afford all members equal opportunity to take part in party affairs, to run for public or party office, and to serve as delegates to party conventions on all levels -- local, district, state or national.
>
> The Republican Party of Connecticut believes in a fully informed membership and a fully informed citizenry; for it is only when all people completely know and understand our goals that we will be able to achieve them.

enjoy the broadest spectrum of popular support and, therefore, appear most likely to obtain electoral success at the polls.

In recent years, however, the Republican Party has been thwarted in its quest for electoral success. A contributing factor to its repeated November failures may be that there are far more registered Democrats than Republicans in Connecticut. Recent party registration figures underscore the magnitude of this disparity. At the time this action was commenced,[4/] Connecticut had

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4/ Presently in Connecticut there are 718,772 registered Democrats,

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659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered but unaffiliated voters.

Animated by the Democratic Party's statistical hegemony, and keenly aware of

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608,613 registered but unaffiliated voters, and 477,749 registered Republicans. The Hartford Courant, Jan. 4, 1985 at A6. Not surprisingly, the Republican Party has experienced little electoral success in recent years. In fact, since 1958, the Republican Party has captured only four of sixteen statewide elections for Governor and United States Senator. During this same period, the Party was victorious in only 25 of the 84 elections for United States Representative. See State of Connecticut Register and Manual 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984).

Connecticut's untapped reservoir of unaffiliated voters, the Republican Party's State Central Committee in August 1983 established a subcommittee to study the Party's existing rules, and devise a strategy to improve the Party's chances for future electoral success. After analyzing the Party's electoral plight, the subcommittee concluded that allowing unaffiliated voters to participate in Republican Party primaries would increase the Party's chances of winning general elections, ensure the nomination of candidates with greater bipartisan support, broaden the involvement of unaffiliated voters in the electoral process and strengthen the two-party system. To

measure the support of this proposal among the Party's rank and file, State Republican Chairman Thomas D'Amore called the state party convention to consider, inter alia, "proposed changes [in party rules] to allow unaffiliated voters to vote in Republican Party candidate selection primaries."

On January 14, 1984, delegates to the State Republican convention approved an amendment to the party rules permitting unaffiliated individuals to vote in Republican Party primaries for the offices of United States Senator, United States Representative, Governor and the gubernatorial "underticket."[5/]

5/ The Rule would not affect voter qualifications in other Republican

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Specifically, the Party Rule provided:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

Because the Party Rule was in direct conflict with Section 9-431, which prohibits unaffiliated voters from voting in any party primary, Republican legislators

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> Party primary elections, including those for seats in the Connecticut Senate and House of Representatives.

sought to amend Section 9-431 during the 1984 session of the Connecticut General Assembly. To this end, in February 1984 State Representative Mae Schmidle introduced Bill No. 5525 (the "Schmidle Bill"), which provided in relevant part:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district . . . .

The Schmidle Bill was referred to the Committee on Governmental Administration and Elections, where debate focused on the practical difficulties that would

accompany implementation of the provisions of the Bill. On February 28, 1984, Albert Lenge, Director and Elections Attorney in the Office of the Secretary of the State, appeared before the Committee and testified that implementation of the Party Rule would be "workable." Despite Lenge's testimony, the Schmidle Bill fell prey to fierce Democratic opposition in the General Assembly.[6/]

6/ On March 7, 1984, the Committee on Governmental Administration and Elections voted 13 to 8 against the Schmidle Bill. The Committee further voted 12 to 9 against reporting the bill out of Committee with an unfavorable report, thereby preventing the proposed legislation from being considered by the entire General Assembly. On March 15, the Committee reconsidered its earlier

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Undaunted by the demise of the Schmidle Bill, Republican legislators sought alternate means to implement the Party Rule. Specifically, they drafted two amendments to Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters." The amendments provided that:

> Where state party rules so provide, an elector whose name

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> vote and reported unfavorably on the bill to the House of Representatives, indicating the Committee's opposition. Burdened with an unfavorable report, the bill languished in the House and was never presented for a vote.

> does not appear on any enrollment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative.

On April 11, 1984, both amendments were defeated decisively in the House, and the increasingly partisan tenor of this issue was manifest in the recorded vote.[7/] One week later, a similar partisan

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7/ At the time of the vote, there were 87 Democrats and 63 Republicans in the Connecticut House of Representatives. One amendment was defeated by a vote of 92 to 54; all 83 Democrats voted against the bill and none in its favor. The second amendment was defeated by a vote of

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struggle ensued on the floor of the Connecticut Senate. There, all twenty-three Senate Democrats voted against an amendment incorporating the provisions of the Schmidle Bill; all thirteen Republicans voted in support.

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93 to 54, with 85 Democrats voting against the bill and none in favor, and 8 Republicans voting against the bill and 54 in favor. Indeed, on June 28, 1985, Connecticut Governor William A. O'Neill, a Democrat, upheld his promise to veto any legislation that would enable the Republican Party to implement its rule. See The Hartford Courant, Jan. 4, 1985 at 1. After Senate Bill No. 5, Public Act No. 85-320, which would have permitted unaffiliated voters to participate in certain primary elections, was passed by both houses of the Connecticut legislature, Governor O'Neill vetoed the bill.

C. The District Court Proceedings

Frustrated in its efforts to implement the Party Rule through legislation, the Republican Party turned its attention to the judiciary. On May 10, 1984, the Republican Party of the State of Connecticut[8/] filed a complaint in the United States District Court for the District of

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8/ The other named plaintiffs were the Chairman of the Republican State Central Committee, Thomas J. D'Amore, Jr., and the Connecticut Republican Party's principal federal elected officials -- United States Senator Lowell P. Weicker, Jr. and United States Representatives Stewart R. McKinney and Nancy L. Johnson. Named as defendant was Julia H. Tashjian, Connecticut's Secretary of the State, who is responsible for administering Section 9-431.

Connecticut, seeking to enjoin the enforcement of Section 9-431 of the Connecticut General Statutes as unconstitutional.

The Party asserted that Section 9-431 substantially infringed its first amendment right to associate for the advancement of common political objectives. Accordingly, it maintained that the statute could be upheld only if it was necessary to advance compelling state interests and only if it advanced those interests in the manner least restrictive of the ability of the Republican Party to structure its candidate selection process as it deems appropriate. In response,

the State of Connecticut claimed that Section 9-431 only incidentally burdened the Republican Party's right of political association and that the statute advanced legitimate state interests. In addition, Connecticut contended that the proposed Party Rule violated Article I, section 2, clause 1 of, and the seventeenth amendment to, the United States Constitution by permitting unaffiliated voters to participate in primary elections for congressional offices, while denying them an opportunity to vote in primary elections for seats in the State legislature.

On July 13, 1984, the Republican Party moved for summary judgment pursuant

to Fed. R. Civ. P. 56. Two days later, Connecticut moved to dismiss the Republican Party's complaint, pursuant to Fed. R. Civ. P. 12(b)(6).[9/] After examining the Joint Statement of Facts and Joint Submission of Documents prepared by the parties, reviewing the extensive materials submitted by the amici curiae [10/] and

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9/ Because Connecticut supplemented its Rule 12(b)(6) motion with affidavits and documentary evidence that were accepted by the district court, Judge Cabranes properly treated the motion as one for summary judgment. Rule 12(b)(6) requires that, when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." See Eklof Marine Corp. v. United States, No. 85-6016, slip op. 3821, 3823-24 (2d Cir. May 14, 1985).

10/ Because of the far-reaching implications of this case for primary elec-

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conducting an evidentiary hearing, Judge Cabranes denied both motions, finding a number of disputed factual issues. The parties then conducted further discovery and prepared a Supplemental Joint Statement of Facts, which was submitted to the district court on July 24. That same day, Connecticut renewed its motion to

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> tions in particular and the two-party system in general, and the benefits to be derived from the presentation of divergent ideological and political viewpoints, the district court invited a variety of interested persons and organizations to participate as amici curiae. Among the amici were the American Civil Liberties Union, the Connecticut Civil Liberties Union, as well as a number of prominent law professors and political scientists.

dismiss, and on the following day, the Republican Party again moved for summary judgment.

On December 5, 1984, Judge Cabranes granted the Republican Party's motion for summary judgment, and denied Connecticut's motion to dismiss. The court concluded that Section 9-431 "substantially impinges" on the Republican Party's first amendment right of political association by allowing the Connecticut legislature to "substitute its judgment for that of the party on . . . the question of who is and (who) is not sufficiently allied in interest with the party to warrant inclusion in its

candidate selection process." Subjecting Section 9-431 to "strict judicial scrutiny," the district court found that the interests proffered by Connecticut to support its mandated closed primary -- avoiding voter confusion, preventing raiding, and preserving the integrity of the electoral process -- were not compelling.

In addition, Judge Cabranes concluded that the Republican Party Rule did not violate Article I, section 2, clause 1 of the seventeenth amendment of the United States Constitution. Those provisions were intended to "dissuad[e] states from capriciously restricting the franchise in

congressional elections." The district court found that the Party Rule would "open[] the political process by including greater numbers of voters in congressional primaries" and would further "the democratic values underlying Article I, section 2."

Accordingly, Judge Cabranes permanently enjoined enforcement of Section 9-431 "as applied to the Republican Party Rule." The State of Connecticut timely filed a notice of appeal.

II. ARTICLE I, § 2 AND THE SEVENTEENTH AMENDMENT

Before addressing the principal

issues raised by this appeal, we dispose of the State's claim that the Party Rule is foreclosed by Article I, § 2 of, and the seventeenth amendment to, the United States Constitution. The Party Rule permits unaffiliated voters to participate in primaries for United States Representatives and Senators, while denying them the corresponding opportunity to vote in primaries for state representatives. According to the State, Article I, § 2 and the seventeenth amendment require "absolute symmetry" between federal and state voter eligibility requirements -- as applied to primary elections -- within a particular state.[11/] Concomitantly, it

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11/ Connecticut maintains that the Party's Rule is unconstitutional be-

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asserts that the order of the district

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> cause the qualifications sections of Article I, § 2 and the seventeenth amendment do not permit federal voter qualifications to be more generous than state qualifications. In accordance with this view, Connecticut asserts that neither Congress nor the state legislatures are authorized to set federal voter qualifications, and that the qualifications for electors of Congress are wholly borrowed from the various state qualifications for voting for state representatives. Under this view, eligibility to vote for United States Representatives and Senators would merely track the underlying State's preexisting system. In support of its position, Connecticut cites the Supreme Court's description of the workings of the qualifications provision set forth in Ex Parte Yarbrough, 110 U.S. 651, 663 (1884):
>
> > The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the
>
> (footnote cont'd)

court -- which implicitly validated the

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> election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

See also Katzenbach v. Morgan, 384 U.S. 641, 647 (1966).

The Party, on the other hand, argues that Art I § 2 and the seventeenth amendment should be interpreted consistent with the intentions that animated the Framers' inclusion of the qualifications language -- a compromise provision permitting suffrage to be determined by reference to state law, but insuring that the states could not establish stricter voting requirements for the selection of federal representatives than they had for

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Party's "open-primary" rule -- must be vacated. We disagree.

A careful examination of Article I, § 2, cl. 1[12/] reveals that the clause is

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state legislators. Essentially, we are urged to hold that a state's qualifications merely set the minimum standard by which federal voter requirements in that state must be measured, rather than determine the only acceptable standard. An electoral scheme that establishes a broader franchise for federal elections than state races would, therefore, be perfectly permissible.

Because we hold that the qualifications sections of Article I, § 2 and the seventeenth amendment are not applicable to primaries, we, unlike our concurring colleague, find it unnecessary to reach this question.

12/ Article I, § 2, cl. 1 provides:

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comprised of two distinct and severable

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> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors, in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The seventeenth amendment, calling for the popular election of Senators, was styled after Article I, § 2. It provides, in pertinent part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

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provisions. The initial phrase, "The House of Representatives shall be composed of Members chosen every second Year by the People," reflects the Framers' desire to establish in at least one legislative branch a representative democracy directly accountable to the state citizenry. See J. Story, The Constitution, § 573 at 422-423 (5th ed. 1891). The language, "chosen . . . by the people," has been interpreted to create in favor of a class of qualified voters a

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According, the two sections share a common interpretation. See Phillips v. Rockefeller, 435 F.2d 976, 979 (2d Cir. 1971).

constitutionally pr tected "right" to participate in the selection of representatives, as well as a protection against interference with the privileges of suffrage -- including the expectation that one's vote will be counted. See, e.g., United States v. Classic, 313 U.S. 299 (1941).

The concluding portion, "and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," unlike the preceding language, has not been subject to intense judicial scrutiny. Because this language constitutes the core of the State's

position, determining its intended place within the federal electoral scheme will ultimately lead to the resolution of this issue.

An inquiry into the events surrounding the adoption of the qualifications clause reveals that its inclusion in Article I, § 2 was the result of compromise at the Federal Convention of 1787. Before approving this language, the Framers entertained various proposals aimed at devising a uniform national standard for the selection of House members. These proposals were rejected, largely because the Framers foresaw great resentment by the people of those States

that had adopted broader principles of suffrage than might be accepted under a national scheme.[13/] The Framers, however,

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13/ Indeed, several members of the Convention suggested that this controversy, though relatively insignificant in comparison to the undeniably monumental features of the document, might even threaten ratification. Most notable among the proponents of state determined qualifications was Oliver Ellsworth, who we observe with the enchantment of historical coincidence was Connecticut's representative. He is said to have opined:

> The right of suffrage was a tender point, and strongly guarded by most of the State Constitutions. The people will not readily subscribe to the National Constitution if it should suggest them to be disfranchised. The states are the best judges of the circumstances and temper of their own people.

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declined to leave the determination of federal voting eligibility solely to the states' unfettered discretion. It was feared that absent some constitutional prohibition state legislatures would seek to involve themselves in the selection of House members. By tying federal suffrage rights to what was presumably the most generous state standard -- voting eligibility requirements for "the most numerous Branch of the State Legislature" -- the Framers' sought to insure that the goal of direct participation of the

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J. Madison, Journal of the Federal Convention, at 468 (1970).

people of each state, rather than the legislatures, would be achieved. Article I, § 2 must, therefore, be properly understood as a compromise between state and federal interests.[14/]

14/ The Federalist's comments on the nature of this accommodation is particularly instructive:

> The provision made by the convention appears to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established by the State itself. It will be safe to the United States, because being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner

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The State of Connecticut unqualifiedly asserts that "there can be no question" but that Article I, § 2 and the seventeenth amendment apply to primaries. In so doing the State relies principally on the Supreme Court's decision in Classic, supra. In that case, the United States prosecuted certain Louisiana

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> as to abridge the rights secured them by the Federal Constitution.

The Federalist No. 52, (J. Cooke ed. 1961).

Commissioners of Elections for allegedly falsifying ballot returns in a Democratic primary for the House of Representatives. The statutes pursuant to which the Commissioners were charged forbade the abridgement of any "rights, privileges and immunities secured and protected by the Constitution and laws of the United States."

In reversing a judgment sustaining a demurrer to the indictment, the Court held that by allegedly altering and falsely counting primary ballots, the election officials had deprived Louisiana residents of their "right to choose at a primary election, a candidate for

election as representative..." Id. at 315. Acknowledging that the framers of the Constitution had not contemplated the "elimination of candidates for Congress by the direct primary" procedure, the Court nevertheless concluded that a right to participate in such primaries was "embraced in the right to choose representatives secured by Article I, § 2." Id. at 315-16.

If the freedom of choice secured by Article I, § 2's command, "The House of Representatives shall be composed of Members chosen . . . by the People," was to be meaningfully protected, the Court reasoned that freedom must exist at every

level of the selection process. The Court stated:

> Where that state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, . . . this right of participation is protected just as is the right to vote at the election...

Id. at 318.

In Smith v. Allwright, 321 U.S. 649 (1944), the Court invoked Classic in holding that the fifteenth amendment's ban on infringement of the "right to vote" based on race extended to party conventions as well as general elections.

Contrary to the State's assertions, we do not find Classic and its progeny control the question before us. As we previously noted, Article I, § 2, cl. 1 contains two distinct provisions concerning suffrage in congressional elections. The opening reference to members "chosen . . . by the people," -- like the fifteenth amendment's protection of the "right to vote" -- recognizes a substantive right of participation in representative democracy. Classic and Allwright's extension of that right to include suffrage in party primaries was considered necessary to assure the vitality of that privilege in twentieth century American politics. We note, however,

that at no point in either opinion was the qualifications section of the clause even discussed. That language, which was not connected to "chosen by the people" in a earlier draft of Article I, § 2[15/] and constitutes a separate sentence in the seventeenth amendment, speaks only to the mechanics of voting and was intended

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15/ In an earlier version of the Constitution, Article I, § 2 read as follows:

> The members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union. The qualifications of the electors shall be the same from time to time, as those of the electors in the several states, of the most numerous branch of their own Legislatures.

as a procedural safeguard to ensure the right of the people to select members of Congress without interference from the state legislatures.

Viewing the question as one of first impression, we decline to interpret the term "Electors" in Article I, § 2 and the seventeenth amendment to include participants for party primaries. We observe that a system of selecting candidates for federal office by party primary is permitted rather than dictated by the Constitution. The source of this power, Article I, § 4, [16/] grants broad authority

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16/ Article I, § 4 provides:

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to the States to "provide a complete code for congressional elections." Smiley v. Holm, 285 U.S. 355, 366 (1932); cf. Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976).

Significantly, Article I, § 4 does not command that the regulation of congressional elections comport with

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> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

procedures employed in administering state elections. Theoretically, then, a state might choose to institute preferential ballot access based on direct primaries for state offices, but leave federal elections to a single vote of the electorate. If an electoral scheme that completely excluded the use of primaries in congressional elections would be permissible, then the Republican Party's rule cannot be said to violate the Constitution simply because it seeks to establish state and federal nominating procedures that differ only with respect to voter qualifications.

Moreover, unlike the situation in

Classic where a narrow reading of the Constitution would have effectively defeated one of the purposes underlying the text, the concern that prompted the qualifications provision -- that a state might unilaterally disenfranchise citizens from the selection of federal legislators -- would not be implicated. Article I, § 4 would allow Congress to override state procedure by directing the establishment of preferential ballot access in congressional races.

Finally, we note that an interpretation of the term "Electors" encompassing persons who participate in a primary would go well beyond simply expanding the

reach of the qualifications provision to include the candidate selection stage -- essentially the result achieved in Classic and Allwright. By contrast, the State's proposed interpretation would require that we recognize a separate class of electors and qualifications for each party's primary. Qualified Republicans would thus be distinct from qualified Democrats. Such a multidefinitional approach is clearly at odds with the Framers' singular and nonpartisan view of voting qualifications. We are reluctant to embrace such a radical and counterintuitive reading of the qualifications provision.[17/]

17/ Such an analytical framework might also at times produce anomolous re-

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Accordingly, we hold that the primary eligibility requirements at issue are not subject to the qualifications provisions of Article I, § 2 and the seventeenth amendment. Because we find no constitutional impediment to the enjoining of Section 9-431, and the resultant enforcement of the Republican Party's "open primary" rule, we turn now to the essence of this appeal.

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sults. Under the "absolute symmetry" theory, for example, a party seeking to nominate candidates only for federal office would find itself without any qualified voters because none of its members would have qualified to participate in a primary for state representatives.

III. THE RIGHT OF ASSOCIATION

In the main, the Republican Party asserts that Section 9-431 substantially interferes with its right of political association by determining who is eligible to participate in its candidate selection process. Before examining in detail the substance of the Republican Party's claim, we believe it is helpful to trace the origins of the right of association and delineate its historical contours. As shall be seen, the right of association has venerable roots, but only recently has it received the imprimatur of the judiciary and been afforded constitutional protection.

A. The Origins of the Right of Association

From time immemorial, societies have been compelled to grapple with an individual's sense of anomie. Although each political order has adopted individuated solutions, every such effort -- whether the Greek polis or the Roman civitas -- has embraced the concept of association as a buffer between the individual and the state.

The history of American political thought reveals that the significance of voluntary association antedates the drafting of our Constitution. Before our ties with England were severed in 1776,

Committees of Correspondence were established to provide "speedy and direct channels" for communication and enable the people to "understand their interests and act in concert," and become effective "arbiters of their own political destiny." H.R. Doc. No. 702, 57th Cong., 1st Sess. 245 (1902). There existed a variety of other nongovernmental organizations and associations that were "close to the people" and satisfied the myriad needs of our infant Republic. See R. Wood, The Creation of the American Republic, 186-96, 319-28 (1969); The Federalist No. 56 (J. Madison).

The importance of political

association was fortified by and memorialized in the Constitution, which included provisions explicitly designed to protect political opposition, and accorded independent vitality by the First Congress, which expressly included the rights of free speech, assembly and petition in the text of the first amendment. Moreover, in the Federalist Papers, James Madison extolled voluntary private association as maximizing the opportunities for self-realization, and minimizing the dangers attendant to centralized power. See The Federalist No. 10, 57 (J. Cooke ed. 1961). The Madisonian link between freedom of association and "true" democracy became embedded in Western political

thought, and was expressed eloquently by de Tocqueville:

> In their political associations the Americans, of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings. They afterwards transfer to civil life the notions they have thus acquired and make them subservient to a thousand purposes. Thus it is by the enjoyment of a dangerous freedom that the Americans learn the act of rendering the dangers of freedom less formidable.

Democracy in America, supra, at 129.

The democracy envisioned by Madison and marvelled at by de Tocqueville, however, bears little resemblance to the realities that today prevail. The structure of American society has undergone a vast metamorphosis in the past two centuries. No longer is the individual the basic political or economic unit and, largely for that reason, the concept of eighteenth century democracy fails to explain the dynamics of our current socio-political system. In recent years, organizations -- political, social and economic -- have become the primary repositories of power. Like all liberties, the right of association must be defined, to a large extent, by reference

to the contours of the existing socio-political landscape.

A corollary of our society's penchant for organization is that the association has achieved a prominence that could hardly have been imagined two centuries ago.[18/] Indeed by the middle of this century, the voluntary association had become one of the linchpins of our

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18/ The rise of the association has paralleled the development of democratic self-confidence and the increasing complexity of social, economic and political life. In the words of Arthur Schlesinger, the association has "restored a sense of self-importance bruised by the anonymity of life amidst great crowds." A. Schlesinger, The Rise of the City 288-90 (1939).

democratic process. Yet, it had not been afforded constitutional protection in its own right.[19/]

B. The Constitutional Right of Association

Although the constitutional text does not mention freedom of association, the Supreme Court, in NAACP v. Alabama ex

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19/ The Court did, however, recognize a variety of quasi-associational activities essential to associational expression as falling within the realm of first amendment protection. Among these hybrid associational forms accorded first amendment protection was the holding of the public meeting, see De Jonge v. Oregon, 299 U.S. 353 (1937), parade, see Cox v. New Hampshire, 312 U.S. 569 (1942), demonstration, see Haque v. C.I.O., 307 U.S. 496 (1939).

rel. Patterson, 357 U.S. 449, 460 (1958), recognized an independent right of association. Such a right, according to the Court, derives from the first amendment guarantees of speech, press, assembly and petition. The issue before the Court was whether an Alabama statute requiring compulsory disclosure of membership in the NAACP imposed "the likelihood of a substantial restraint upon the exercise by [the NAACP's] members of their right to freedom of association." Id. at 462.

Of even greater importance than the unanimous holding that the NAACP could not be compelled to deliver to the Alabama Attorney General the names and

addresses of its members and agents in the State of Alabama was the reasoning relied on by the Court in reaching that result. The Court implicitly bifurcated associational rights into their individual and collective components. In examining the individualistic aspect, the Court "recognized the vital relationship between freedom to associate and privacy in one's associations," and declared that the constitutional prohibition against mandatory identification of supporters is especially robust where the group espouses dissident beliefs. Id.

The principles announced in NAACP v. Alabama have been reaffirmed consistently

as courts continue to protect the individualistic component of freedom of association not only against direct attack, but also against inroads by the insidious interference that often follows public identification with a controversial organization. In sustaining a constitutional challenge to another coerced disclosure of NAACP membership lists, for instance, the Supreme Court reasoned that the government's action represented a substantial encroachment upon an individual's right of privacy of association. See Bates v. City of Little Rock, 361 U.S. 516 (1960).

More recently, in Roberts v. United

States Jaycees, 104 S. Ct. 3244 (1984), the Court expounded upon the meaning of the individual component of freedom of association. Writing for the majority, Justice Brennan noted that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Id. at 3249. Freedom of association, therefore, is to be protected as a fundamental component of our personal liberty.[20/] Consistent with this

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20/ The emotional enrichment individuals draw from their affiliations with

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interpretation, the Court has accorded constitutional protection to that select group of intimate relationships and bonds that cultivate shared ideals and beliefs. See Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (marriage); Smith v. Organization of Foster Families 431 U.S. 816, 844 (1977) (raising and educating children); Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977)

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> others, and the overriding tendency of individuals to frame their identity by reference to a particular group, provide the foundations upon which the individual component is premised. See Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 4 (1964).

(cohabitation with relatives).[21/] It has also been held that an individual enjoys the right to associate with the candidate of his choice. See Buckley v. Valeo, supra. This individual association may be manifested by contributing money to, or working for, the candidate's campaign, or supporting the candidate in the election.

21/ These relationships share a variety of common elements, including their relative smallness, the intensity of the affiliation, the depth of the commitment and the commonality of beliefs and ideals. As such, affiliations with these characteristics implicate an individual's personal liberty and should be presumed to possess the requisite intimacy to warrant protection under the individual right of association rubric.

By contrast to the fertile development of the individualistic aspect of associational rights, the collective component, also conceived in NAACP v. Alabama, remains largely nascent. In that case, the Court referred to the ability of NAACP "members to pursue their collective effort to foster beliefs," 357 U.S. at 463. In addition, the Court evinced a concern with an association's ability to advocate the beliefs of its members and recognized that an association may be able to realize objectives that differ qualitatively from those attainable by individuals.

The right to speak, petition or

assemble would be hollow indeed if the corresponding freedom to engage in group effort toward those ends was not accorded independent constitutional protection. Because of this nation's abiding commitment to pluralism, and our candid recognition that the sum of an association may often be far greater than its individual parts, courts have been particularly hesitant to countenance any governmental intrusion -- either direct of indirect -- into the core of expressive group effort. Whether the government seeks to withhold benefits from individuals because of their membership in a group or association, see Healy v. James, 408 U.S. 169, 180-84 (1972); compel disclosure of an

individual's membership in a group seeking anonymity, Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 91-92 (1982); or interfere with the internal organization or affairs of the association, see Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); such interference with the right of collective association may be justified only by narrowly drawn regulations that serve compelling state interests. For, as Justice O'Connor stated in her concurring opinion in Roberts v. United States Jaycees, supra, such state regulation "will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." 104 S. Ct. at 3259

C. The Right of Political Association

Freedom of association confers a right to join with others to pursue activities independently protected by the first amendment. Because political advocacy and participation in partisan politics are lodged at the heart of the first amendment, freedom of association necessarily includes a right of political association. Concomitantly, freedom of association protects the right to form a political party for the advancement of partisan political beliefs.

Although the genesis of the constitutional right of political association

may be traced to NAACP v. Alabama, its maturation occurred more than one decade later when, in a series of decisions, the Court transformed political association from abstract theory into an effective right.

In Williams v. Rhodes, 393 U.S. 23 (1968), the American Independent Party challenged Ohio's ballot regulations, which would have barred George Wallace, the Party's candidate from inclusion on the 1968 presidential ballot. Pursuant to Ohio law, new parties were required to file nominating petitions signed by a number of registered voters equal to at least fifteen percent of the total state

vote in the last gubernatorial election. For a candidate to have his name placed on the November general election ballot, these petitions were required to be filed in February. Although the American Independent Party satisfied the numerical requirement by collective 450,000 signatures, it did not file its petition by the February deadline. The Supreme Court concluded that the statutory electoral scheme, which effectively limited the ballot to two major parties, placed a substantial burden on the right of individuals to associate for the advancement of political ideas.[22/] As Justice Black

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22/ The Court also invoked the strict scrutiny standard of equal pro-

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reflected at the outset of his opinion for the majority, "[t]he State of Ohio . . . has made it virtually impossible for a new political party, even though it has hundreds of thousands of members . . . to be placed on the state ballot." Id. at 24. Indeed, the Williams Court intimated that a statutory regime denying a group the fruits of their association -- political impact -- runs afoul of the first amendment no less than one precluding association itself. See L. Tribe, American Constitutional Law 779

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tection review because it found a burden placed on the right of voters to cast their ballots effectively.

(1978). Subjecting the Ohio regulations to strict scrutiny, the Court found that none of the interests proffered by Ohio to justify its ballot access restrictions was compelling.

Five years later, in Rosario v. Rockefeller, 410 U.S. 752 (1973), the Court rejected a challenge to a New York statute that conditioned eligibility to vote in a primary on a declaration of affiliation made eight to eleven months prior to the primary election. The Court noted that the petitioners -- who were eligible to register and to declare their party affiliation before the cutoff date, but who did not do so until the deadline

had passed -- were indeed excluded from the party with which they identified. Their associational rights were not infringed, according to the Court, because their disenfranchisement was the result of their "own failure to take timely steps to effect their enrollment." Id. at 758. Accordingly, the Court subjected the New York statute to only minimal scrutiny and readily found a legitimate state interest in preventing party raiding.

That same Term, in Kusper v. Pontikes, 414 U.S. 51 (1973), the Court again expatiated upon the right of political association, and struck down as

unconstitutional an Illinois statute preventing persons from voting in a party primary if they had participated in the primary of another party within the preceding twenty-three months. The Court found that the petitioner, who had voted in a 1971 Republican primary, was wed to that party by the Illinois statute although she no longer wished to be indentified with it. "Unlike the petitioners in Rosario, whose disenfranchisement was caused by their own failure to take timely measures to enroll," the Court noted "there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary." Kusper, supra, 414 U.S. at 60.

Focusing on the individual associational component, the Court concluded that by "locking her in," the Illinois statute substantially infringed her right to associate "effectively with the [political] party of her choice," id. at 58, and could be upheld only if it were shown to be necessary to further a compelling state interest that could not be achieved by a less restrictive means. Examining the Illinois durational affiliation statute in light of this standard, the Court had little difficulty concluding that it did not represent the least restrictive means of preventing raiding and preserving the integrity of the electoral process.

In 1978, the right of political association enjoyed by a party and its adherents was rearticulated and bolstered in Cousins v. Wigoda, 429 U.S. 477 (1978). There, as in the instant case, the Court was called upon to harmonize the discord existing between state law and party rules. At issue was a ruling by an Illinois appellate court upholding an order that prevented the 1972 Democratic convention from replacing certain delegates elected in conformity with Illinois law but in violation of a Democratic Party rule. The Court reversed, reasoning that the injunction served no compelling state interest and that the state lacked sufficient justification to

intrude so extensively into the associational rights of party members. Although the ratio decidendi of the case was that a state possesses a meager interest in preserving the integrity of a national nominating convention, the Court's language suggests that it is the party that has an associational interest in deciding who may participate in its activities. Indeed, the opinion suggests that a party's right to associate may even protect a more generalized right of group self-governance. Id. at 490-91.

D. State Regulation of Primary Elections

In crafting an expansive right of

political association, the Supreme Court provided the analytical tools needed to reconcile the inevitable tensions among a political party's right to self-determination, an individual's right to participate in primary elections, and the state's interest in regulating such elections. These competing rights and interests present three potential challenges: First, independent voters may challenge a state-mandated closed primary, claiming that they have a right to vote in that primary election. In addition, a political party may challenge a state-mandated open primary on the grounds that it includes voters lacking a right to participate in the primary

election. Finally, there exists the situation presented by the instant appeal: A political party may challenge a state-mandated closed primary, claiming the state regulations prohibit individuals with whom the party members wish to associate from participating in the primary. To date, courts have addressed only the first two of these challenges. See generally, Note, "Primary Elections and the Collective Right of Freedom of Association," 94 Yale L.J. 117 (1984).

The first category of challenge was raised in Nader v. Shaffer, 417 F. Supp. 837 (D. Conn.), aff'd mem., 429 U.S. 989 (1976). There, the United States

District Court for the District of Connecticut upheld the constitutionality of section 9-431 of the Connecticut General Statutes against a challenge by unaffiliated voters who sought to participate in the Republican Party primaries against party wishes.[23/]

Because denying an individual the opportunity to vote for a candidate in a primary does not infringe his right of association, see Rosario v. Rockefeller, supra, the court subjected section 9-431 to a less than strict level of scrutiny.

23/ At the time, the Republican Party rules did not permit unaffiliated voters to vote in primary elections.

The court in Nader held that the state had a legitimate interest in protecting party members from any intrusion into their "associational rights," Nader, supra, 417 F. Supp. at 846-47, including the right of candidate selection, by those with adverse political principles. In so concluding, the court implicitly recognized that associational rights attach to the political party in its candidate selection process, but not to the independent voter excluded from the primary. See also Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14 (1982) (political party not required to include nonmembers in procedure to select replacement for deceased commonwealth legislator).

This theory of collective associational rights also explains the Supreme Court's decision in Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981), which presented the second type of challenge to state regulation of primary elections. There, the issue before the Court was whether Wisconsin could constitutionally compel the national Democratic Party to seat at its national convention a delegation chosen in a manner that expressly violated the party's rules. The rules of the national Democratic Party permit only those individuals who are willing to affiliate publicly with the Democratic Party to participate in the process of

selecting delegates to the Party's national convention. The Wisconsin election laws, however, allow voters to participate in its Democratic presidential candidate preference primary without regard to party affiliation and without requiring a public declaration of party preference.

Relying on the associational rights possessed by a political party and its adherents, the Court reasoned that freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." Democratic Party, supra, 450 U.S.

at 122. Because the members of the Democratic Party formulated rules defining their associational rights, Wisconsin could compel the Democratic Party to seat a delegation in a manner that violated the Party's rules only if such a statute were supported by a compelling interest. After examining Wisconsin's asserted interests in preserving the overall integrity of the electoral process, increasing voter participation in primaries and preventing harassment of voters, the Court concluded that these claims were insufficient to justify the state's "substantial intrusion into the associational freedom of members of the National Party." Id. at 126 (footnote omitted).

In discussing the nature of this intrusion, the Court noted that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions -- thus impairing the party's essential functions." Id. at 122. Of even greater significance, the Court reinforced the unstated principle that "the stringency, and wisdom, of membership requirements is for the association and its members to decide." Id. at 123 n.25. After all, "a State . . . may not constitutionally substitute its own judgment for that of the Party." Id. at 123-24; see also Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) ("[A]

party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution"), cert. denied, 424 U.S. 933 (1976).

Manifest in the Court's decisions in the area of political association, then, is the principle that absent a compelling interest, a state may not interfere with the associational rights enjoyed by political parties and their adherents. Among these rights is that of a political party to choose its own structure, select its own standard bearers, and formulate its own platform -- all free from the

intrusion of state regulation. See Democratic Party, supra. This principle extends to party affairs in general and to primary elections in particular.

IV. DISCUSSION

Mindful of these tenets, we turn now to the precise issue raised by the instant appeal: Whether Section 9-431 of the Connecticut General Statutes substantially interferes with the Republican Party's collective right of political association. Or, phrased in its simplest terms, whether the right to delineate the group of registered voters who may participate in a primary election inheres in

the party alone or whether the state may play a substantial role in defining that group.

For the reasons set forth below, we believe that, absent compelling interests, the selection of candidates by a political party is a function that properly falls to the party and not the state. Accordingly, we hold that Section 9-431 substantially interferes with the Republican Party's first amendment right to define its structure, shape its policies and engage in effective political association.

A. The Nature of the Intrusion

At first blush, Connecticut's intrusion into the associational rights of the Republican Party is not readily apparent.[24/] For, on its face, Section 9-431

24/ The State emphasizes that unaffiliated voters seeking to participate in the Republican Party's primary may do so merely by registering with the Party one day prior to the election, and urges that Section 9-431 only incidentally burdens the Republican Party's right of political association. This argument is persuasive where independent voters challenge state laws excluding them from participating in primary elections. See Nader, supra. In such cases, the ability to comply with the essentially pro forma requirement of affiliation is exclusively within the power of the independent voter, and the unaffiliated

(footnote cont'd)

merely prohibits voters who are not enrolled in a political party from

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> voter excluded from the primary cannot be deemed to have suffered any infringement of his right to associate.
>
> This reasoning is inapposite where a political party challenges a state law excluding independent voters from participating in its primaries. Although independent voters possess the ready means to overcome the burden on associational rights imposed by a closed primary law, the political party does not. Indeed, there is nothing the Republican Party may do, pursuant to Section 9-431, to permit unaffiliated voters to participate in its primaries. Consequently, the statute's affiliation requirement substantially burdens the associational rights of a party that seeks to broaden its appeal by allowing unaffiliated voters to participate in its candidate selection process.

participating in primary elections. The statute's intrusiveness, however, becomes clear when one realizes that it is expressly at odds with the organizational aims and electoral aspirations of the Republican Party, which explicitly amended its rules to permit unaffiliated voters to vote in certain primary elections.

In essence, then, we are faced with the situation where a statute -- enacted by a Democratic controlled state legislature -- effectively regulates the structure and candidate selection process of the Republican Party. In and of itself,

legislative definition of an association's boundaries may not appear to run afoul of the first amendment. Nevertheless, in light of the intimate relationship between the structure of a political association and the message ultimately transmitted by that group, we believe the inexorable effect of the Connecticut legislation is to alter the Party's message, and thus strike at the very heart of the first amendment. It is to these concerns that we now turn.

The Supreme Court has recognized that freedom of association serves as a

capacious shield according constitutional protection to a variety of specific rights. Among this bundle of associational freedoms is the right of a group of individuals to form a political party for the advancement of partisan political beliefs. See Cousins v. Wigoda, supra, 419 U.S. at 487. Indeed, the "basic function of political parties" is to nominate candidates for the expression of shared political beliefs, Kusper, supra, 414 U.S. at 58. If the right of political association is to retain its vitality, then, a party must remain free to seek compromise among the varied

interests of its adherents. Undue state interference with the party primary -- including state mandated exclusion of unaffiliated voters -- stands to distort the compromise that might have been struck among these varied interests and, therefore, distort the party's choice among competing political beliefs. By prohibiting unaffiliated voters from participating in party primary elections, therefore, the Connecticut legislature has influenced the content of the compromise emerging from those elections.

Traditionally, unaffiliated or independent voters have not parroted the views expressed by the party faithful,

but have injected new and innovative ideas into the political marketplace, and challenged the status quo at every juncture. See Adamany, "Crossover Voting and the Democratic Party's Reform Rules," 70 Am. Pol. Sci. Rev. 536 (1976). Because candidates for elected office frame their positions largely by reference to what they perceive to be the concerns of the relevant electorate, statutory circumscription of primary eligibility requirements is certain to affect the content of the ultimate message transmitted by that party. Consequently, the right of political association must be deemed to protect the ability of political party members to identify those persons with whom

they wish to associate and allow them to play a part in determining the shared ideals of the party. To rule otherwise, would ignore the teachings of the first amendment and countenance state control, albeit indirect, over a political party's ideology.

Collateral to Section 9-431's indirect interference with the Republican Party's formulation of a political message is the statute's diminution of the effectiveness of the association itself. The Supreme Court has held that a political party enjoys the right to determine the most effective manner in which to associate, select candidates, and maximize

its chances of victory in the general election. See Kusper v. Pontikes, supra, 414 U.S. at 58; Williams v. Rhodes, supra, 393 U.S. at 30. After all, electoral success -- whether as a means or as an end -- is the raison d'etre of every political party. See Storer v. Brown, 415 U.S. 724, 745 (1974).

The Republican Party in Connecticut, however, has been disappointed repeatedly in its quest for electoral success. Admittedly, the principal reason for these failures is the existence of fifty percent more registered Democrats than Republicans in Connecticut. The Republican Party has sought to increase the

likelihood that candidates with a broader base of popular support will emerge from its primaries -- that is, to maximize the effectiveness of its associations -- by amending its rules to allow unaffiliated voters to participate in selected primaries. The legislative branch, however, has thwarted the Party's efforts to reap the fruits of an expanded association and, in so doing, has substantially interfered with the Republican Party's constitutionally protected right, see Williams v. Rhodes, supra, 393 U.S. at 30-31.

In analyzing the maze of legislative motive and political effect, we cannot

ignore the fact that the Democratic Party, which controls the state legislature, may have exploited its position to structure the electoral process in such a way as to entrench itself in power and immunize itself against successful attack by the Republican Party.[25/] We are particularly wary of efforts by government officials to control the very electoral

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25/ Apart from the ability to structure the political process in an advantageous manner, incumbents enjoy a variety of other benefits that inure to their electoral advantage. Perhaps most significant among these is the surfeit of press coverage accorded incumbents, particularly in relation to their challengers. See C. Tidmarch & B. Karp, "The Missing Beat: Press Coverage of Congressional Elections," Congress & the Presidency 47, 54-55 (Spring 1983).

system that serves as the primary check on their power. Indeed, few concepts are so antithetical to the notion of representative democracy as that of a temporary majority entrenching itself by manipulating the system through which the voters, in theory, may register their dissatisfaction by choosing new leadership. In this case, there exists at least the spectre of such entrenchment. Every attempt by the Republican Party to improve its chances for electoral success -- in a sense to enhance the competitiveness of the two-party system in Connecticut -- was thwarted by Democrats in both houses of the state legislature, who voted unanimously against legislation to

allow implementation of the Party Rule. Moreover, on June 28, 1985, the Democratic Governor of Connecticut upheld his promise to veto any legislation that would allow the Republican Party to implement its rule. As a result of these developments, we are constrained to conclude that, to some limited extent, the State of Connecticut has stifled and inhibited robust political debate, placed obstacles in the path of the Republican Party's pursuit of elected offices and new adherents, and thereby minimized the accountability of elected officials to their constituents.

Accordingly, we hold that Section

9-431 substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association. As such, the statute must be subjected to strict judicial scrutiny.

B. The State's Defense of Its Regulation

A state regulation that substantially burdens first amendment rights of political association may be upheld only if it is necessary to advance compelling state interests and only if it is tailored to advance those interests in the least restrictive manner. See Roberts v.

United States Jaycees, supra, 104 S. Ct. at 3258; Democratic Party v. Wisconsin, supra, 450 U.S. at 124; Cousins v. Wigoda, supra, 419 U.S. at 489; Williams v. Rhodes, supra, 393 U.S. at 31; Unity Party v. Wallace, 707 F.2d 59, 62 (2d Cir. 1983).

The State asserts that its mandated closed primary law is narrowly tailored and is necessary to advance compelling state interests -- preventing raiding, avoiding voter confusion, promoting a stable two-party system, and preserving the integrity of the electoral process. We address these claims seriatim.

1. Preventing Raiding

Raiding is a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." Rosario v. Rockefeller, supra, 410 U.S. at 760. The State's interest in preventing raiding, though it may be legitimate in certain contexts,[26/] is inapposite in the

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26/ The ability of a party or a group of persons to organize an effective raid in an open primary "has never been conclusively proven by survey research." Openness, Participation and Party Building Reforms for a Stronger Demcratic Party 68 (1978) (Winograd Commission); see also A. Ranney, "Turnout and Representation in Presidential Primary Elections," 66 Am. Pol. Sci. Rev. 21, 35-36 (1972).

instant action. The Party Rule allows only unaffiliated voters to participate in Republican Party primaries; no such invitation has been extended to Democrats or members of other political parties. Moreover, we believe the spectre of Democratic voters severing their party ties en masse, and claiming independent status to mount a raid on a Republican Party is effectively eliminated by another section of the Connecticut General Statutes, see Conn. Gen. Stat. § 9-59, which provides that a person affiliated with one party may not vote in the primary of another party within six months after leaving his original party.

Finally, the State's professed interest in preventing raiding is belied by its recent enactment of Public Act 84-118, permitting unaffiliated voters to affiliate with a political party until noon on the day immediately prior to the primary election. It would appear anomalous for a state truly concerned with voter raiding to eliminate any obstacle to independent voters determined to disrupt the candidate selection process of a political party.

2. Avoiding Voter Confusion

The second interest articulated by the State in defense of its closed

primary law is the need to avoid confusion among voters. The State maintains that, as a necessary concomitant of preferential ballot access, it may ensure that the candidate who wins a party primary accurately represents the views of the party members, and not those of an amorphous group of unaligned voters. The State premises its argument on the assumption that many voters rely on partisan labels as shorthand for particular ideologies, and thus presume that a candidate in the general election running under a party banner espouses the views generally held by party members,[27/] see N.

27/ In general elections, few voters exercise independent judgment beyond

(footnote cont'd)

Nie, S. Verba & J. Petrock, The Changing American Voter 47-56 (1976), Martin Van Buren, Inquiry Into the Origin and Course of Political Parties in the United States 6, 226 (1867). Arguing that such "reliance" is widespread, the State claims it has an interest in protecting voters from confusion. Even if this interest were deemed legitimate, a state certainly does not have a compelling interest in shielding from confusion those voters who

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> the most highly publicized races. The further one moves down the ballot, the more difficult it is for voters to make selections without relying on the party label. See P. David, Party Strength in the United States 302-03 (1972).

engaged in unthinking and Pavlovian reliance on party labels. Cf. Williams v. Rhodes, supra, 393 U.S. at 32. Moreover, the State's position necessarily presumes a duty to define the composition of political parties in such a way as to clarify the political and ideological distinctions between them. In effect, Connecticut professes to have a compelling interest in deciding the ideological slant and bases of support for a political party. Most decidedly, however, it is the prerogative of the political party -- and not the state -- to determine whether it should be structured as a broad-based, relatively non-ideological organization or as a closely-knit,

strongly ideological unit. The mere incantation of a talismanic phrase such as "voter confusion" cannot transform a specious interest into a compelling one.

3. Maintaining the Two-Party System

The State further claims that its closed primary law maintains party indentity, encourages politics of "coalition and accommodation," A. Bickel, Reform and Continuity 21-22 (1971), and is therefore required to preserve a stable two-party system. In framing its argument, the State points to the parade of horribles that would befall democracy if the Party Rule were inplemented. Beneath

this veneer of hyperbole, we find little substantive support for the State's position. Moreover, the issue is not, as urged by the State, which type of party primary -- open or closed -- is preferable. Rather, the proper inquiry is whether the State's insistence that the Republican Party adhere to a particular candidate selection process is justified by a compelling interest.

We are unable to discern how deviating from the state-mandated closed primary system will breed the splintered parties and unrestrained factionalism feared by the State. Indeed, it would appear that an open primary would achieve

precisely the opposite effect, discouraging factionalism by forging a broader coalition of interests within a single political party. See Dawson, "Social Development, Party Competition, and Policy," in The American Party Systems 208-09 (W. Chambers & W. Burnham eds. 1967).[28/] See also Anderson v. Celebreeze, 460 U.S. 780 (1983).

28/ The experiences of those states that have adopted open primaries lend support to this conclusion. See Hawaii Rev. Stat. § 12-31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws §§ 168.575, 168.576; Minn. Stat. § 204D.08(4); Mont. Code Ann. § 13-10-301(2); N.D. Cent. Code § 16.1-11-22; Utah Laws § 20-3-19(2); Vt. Stat. Ann. Tit. 17 § 2363; Wisc. Stat. §§ 5.37, 6.80(e).

By portraying change in the political order as anathema, the State ignores the flux that has traditionally characterized our two-party system.[29/] As circumstances change, parties must be free to explore the political requisites of a given period. Whether the course selected by a party leads to success and power or to failure and decline, the first amendment guarantees that the decision be the choice of the party, not the state.

29/ "The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction." T. Emerson, The System of Freedom of Expression 47 (1970).

4. Preserving the Integrity of the Electoral Process

The final interest proffered by the State in defense of its closed primary law is preserving the integrity of the electoral process. Because primary elections are conducted at state expense, and because the state strengthens political parties by conferring preferential general election ballot access upon candidates selected in party primaries, it cannot be gainsaid that a state possesses a strong interest in the operation of its electoral regime.

We can well imagine circumstances in which the integrity of a state's

electoral processes is threatened, and where some level of governmental intrusion into the administration of primaries is necessary to protect the state's vital interest in the fair and efficient running of elections. Indeed, states are inevitably and inexorably involved in the mechanics of elections, and this involvement may always be characterized as somewhat "intrusive." Each time a state sets hours during which polls will be open, or designates polling places, or designs a system for absentee balloting, its choice affects the ability of certain persons to associate for political ends. Nevertheless, as these intrusions become more pronounced, and their effects

increase, the ill sought to be cured by governmental involvement must become correspondingly greater.

Notwithstanding Connecticut's claim that implementing the Party Rule would render the state's electoral processes unmanageable and grant the Republican Party "a practical veto over state law, and the party [would] become[] a law unto itself," Brief for Appellant at p. 45, we find little evidence in the record to support this assertion. Indeed, the State of Connecticut appears more concerned with the Party's ability to change its rules at will than with the specifics of the rule as it has enacted. The

thrust of the State's argument is that the Party, if it may enact this rule, may in the future enact any and all rules it wishes. The fear expressed by the State in its brief and voiced at oral argument is that the Republican Party -- and, perhaps, every other party -- may implement new rules every year, requiring the State to change its electoral procedures constantly. The State further raises the spectre of party rules altered on the eve of election, forcing the State to recalibrate its electoral system on a moment's notice.

Indeed, the concerns of the State appear to be sincerely held. And, as we

have noted, we can imagine circumstances where a state might in fact be forced to spend vast sums of money and endure considerable inconvenience to effect the whims of private political associations. But we stress that, in this case, the State's fears are just that -- fears, and pure speculation will not support as massive a governmental intrusion into the affairs of a political association as that worked by Section 9-431.

As Justice Black noted in Williams v. Rhodes, supra, 393 U.S. at 33, "No ['theoretically imaginable'] danger can justify the . . . crippling impact on the basic constitutional rights involved in

this case." These words are particularly apt in the instant action.

Even if we were to assume, arquendo, that the State's compelling interest in preserving the integrity and stability of its electoral process was not overcome by the hypothetical nature of the potential abuses, we believe the State's interest may be justified by means far less drastic than its mandated closed primary. If, for example, Connecticut's concern truly lies with the constant changing of party rules, the State could simply impose a limit on the frequency with which party rules could be changed. Or, if the State's fears were caused by the spectre

of last-minute changes in the manner of selecting candidates, the legislature could properly impose restrictions on the ability of a party to change its rules for a specified period prior to an election. Unlike Section 9-431, such legislation would be appropriately tailored to achieve the State's interests, while simultaneously minimizing the intrusion into a political party's first amendment right of association.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court, enjoining the Secretary of the State from

enforcing Section 9-431 of the Connecticut General Statutes.

OAKES, Circuit Judge (concurring):

While the issues are many and complex, the answer in this case seems to me evident. For the reasons perhaps best stated in the amici curiae brief of the political scientists (James MacGregor Burns, Barbara Burrell, William Crotty, Roman B. Hedges, John S. Jackson III) and in the Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 117 (1984), I concur in affirming the judgment. Both

broadly inclusive and narrowly exclusive models of political organizations were anticipated (and are or should be protected) in light of the purposes of the First Amendment, see The Federalist Nos. 10,47 (J. Madison); G. Wood, The Creation of the American Republic, 1776-1787 18-28. 189-96, 319-28 (1969). And a political party is entitled. Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121-22 (1981); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975), to make the choice in the first instance as to which model it wishes to follow, see Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972), provided of course that it does not engage

in invidious discrimination, directly or deviously. Cox v. Louisiana, 379 U.S. 536, 557-58 (1965); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958). No compelling contrary state interest has been shown, as developed in Judge Kaufman's opinion.

The "problem" emphasized in the State of Connecticut brief (pp. 7-14) that the Republican Party Rule provides for different voter qualifications for Congress than it does for the state legislature seems to me to be specious and I would meet it more squarely than does that opinion. All that article I, section 2 means, it seems to me, is that anyone who is permitted to vote for the

most numerous branch of the state legislature has to be permitted to vote for Congress and the Seventeenth Amendment applies the same rule to the election of senators. This conclusion is buttressed, first, by the constitutional history of article I, section 2. As one commentator puts it:

> The difficulty confronting the convention here lay in the fact that every state had adopted different qualifications for its electors. Each state was a law unto itself. The framers of the constitution, therefore, saw that the adoption of a uniform qualification for federal voting was impossible, as it would embarrass and inconvenience all the states, no matter what qualifications might be adopted . . . . Should an entirely new qualification be adopted, it would perplex and trouble all, and cause irritation by excluding some from voting for members of Congress, who would be able

> to vote for members of the state legislatures, or vice versa. The convention, therefore, wisely adopted the qualifications fixed by the states in their constitutions and laws for the election "of the most numerous branch of the State Legislature."

1 D. Hutchinson, The Foundations of the Constitution 31 (1975) (footnotes omitted). It is true that the precise compromise adopted was by the Committee of Detail, which did not in the fashion of today's congressional committees issue a report, but the Founding Fathers surely appreciated, as Pennsylvania's James Wilson put it, that "[i]t would be very hard & disagreeable for the same persons at the same time, to vote for representatives in the State Legislature and to be

excluded from a vote for those in the Natl. Legislature." Madison, Notes of Debates in the Convention of 1787 401 (A. Koch ed. 1966). Connecticut's Oliver Elseworth, for example, warned that "people will not readily subscribe to the Natl. Constitution if it should subject them to be disenfranchised." Id. Benjamin Franklin and South Carolina's John Rutledge spoke against "narrow[ing]" or "restraining" the right of suffrage. Id. at 404-405. While the debate centered on the question whether the right of suffrage would be restrained to freeholders, the sentiments expressed demonstrate that broadening the right to suffrage rather than narrowing it was the Father's aim.

Secondly, there was a general concern that

> [t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is comfortable to the standard

> already established, or which may be established, by the State itself. It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions is such a manner as to abridge the rights secured to them by the federal Constitution.

The Federalist No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961) (emphasis added). To be "comfortable to" is not to be identical with. The use of qualifications of the most numerous branch of the state legislatures was, then to serve as a buffer against a state's imposing greater qualifications upon the voters for the House of Representatives than upon its own voters for the corresponding branch of the state legislature. As Madison put it in The Federalist No. 57,

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

Id. at 351.

Thus, as Professor Corwin has stated, "It was the original constitutional scheme to vest the determination of qualifications for electors in the congressional elections solely in the discretion of the States, save only for the express requirement that the States could prescribe no qualifications other than

those provided for voters for the more numerous branch of the legislature." Congressional Research Service, Library of Congress, The Constitution of the United States of America Analysis and Interpretation 99-100 (1973). It does not take away from this argument that the states' power to prescribe those qualifications has been further limited, not only by judicial decision, e.g., Carrington v. Rash, 380 U.S. 89 (1965), and by four constitutional amendments (XV (race); XIX (sex); XXIV (payment of poll tax); XXVI (age)), but by congressional action under the Fourteenth Amendment, section 5, e.g., 42 U.S.C. § 1973b(e), upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966).

And while I do not make much out of the argument, it is true, of course, that there was no such thing as a party primary when article I, section 2, was written. There was, however, by the time the Seventeenth Amendment (setting forth as qualifications for voters for Senators the same as for voters for the House) was adopted (1913); yet the Amendment, though proposed by the Congress, does not speak to primary elections as Congress could and did do when it felt the necessity, see U.S. Const. amend. XXIV.

Accordingly, I concur in the judgment of affirmance.

85-766 (3)

Supreme Court, U.S.
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No.

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix to Jurisdictional Statement
Volume II

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMES J. D'AMORE, JR.	:	
v.	:	CIVIL NO. H 84-548 (JAC)
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut	:	

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RULING ON DEFENDANT'S MOTION
TO DISMISS AND PLAINTIFFS'
MOTION FOR SUMMARY JUDGEMENT

JOSE A. CABRANES, District Judge:

This case brings into dramatic conflict the power of states to regulate primary elections and the right of political parties to freedom of association under the First Amendment to the United States Constitution. The State of Connecticut has asserted a broad and

discretionary claim to authority over the activities of political parties based on their integral involvement in the selection of candidates for public office. Plaintiffs acknowledge that political parties are not typical voluntary organizations immune from state regulation and constitutional strictures,[3] but maintain that freedom of association would prove an empty guarantee if states were unrestrained in their ability to dictate eligibility requirements for participation in party's candidate selection process.

The action challenges the validity of Connecticut's "closed primary law," Section 9-431 of the Connecticut General

Statutes, which prohibits voters who are not enrolled in a political party from participating in primary elections.[4] This is the first case to present the situation in which a political party challenges a closed primary law on First Amendment grounds. Plaintiffs are the Republican Party of the State of Connecticut, the Chairman of the Republican State Central Committee, Thomas J. D'Amore, Jr., and the Connecticut Republican Party's principal federal elected officials, United States Senator Lowell P. Weicker, Jr. and United States Representatives Stewart B. McKinney and Nancy L. Johnson. The defendant is Julia H. Tashjian, Secretary of the State of the

State of Connecticut. ("Connecticut" or "defendant"), who is responsible for administering the challenged statute. Plaintiffs allege that Section 9-431 infringes their First Amendment right to associate for the advancement of common political objectives. They seek to have this court declare the statute unconstitutional and enjoin its enforcement. In 1976, the constitutionality of the very statute at issue in this case was challenged by unaffiliated voters who desired to participate in primary elections against the express wishes of political parties. See Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.)(three-judge court), aff'd mem., 426 U.S. 989 (1976). The

court in Nader held that Connecticut was justified in preventing these unwanted intruders from disrupting party primaries. In this case, the Connecticut Republican Party is no longer a willing beneficiary of the protections afforded by the state's closed primary law. The party now seeks to open its candidate selection process to unaffiliated voters. Accordingly, the concern with barring unwelcome "outsiders" that motivated the result in Nader is not present here.

On January 14, 1984, the delegates to the state convention of the Connecticut Republican Party approved an amendment to the party rules permitting unaffiliated voters to join with enrolled

Republicans in voting for candidates for the offices of the United States Senator, United States Representative, Governor and the gubernatorial "underticket" in primary elections.[5] The amendment would not affect voter qualifications in other Republican Party primary elections, including those for seats in the Connecticut Senate and House of Representatives; enrollment in the party would continue to be a requirement for voting in those primaries. The amended party rule is in direct conflict with Section 9-431.

Because Section 9-431 substantially interferes with plaintiffs' associational rights, it is subject to strict judicial scrutiny. The statute can thus be upheld

only if it is necessary to advance compelling state interests and if it advances those interests in the manner least restrictive of the ability of the Republican Party to structure its candidate selection process in the way it deems appropriate.[6]

In the circumstances of this case, the purposes purportedly served by Section 9-431 -- the prevention of raiding, the avoidance of voter confusion, and the preservation of the two-party system -- are not compelling state interests justifying the substantial burden that the statute imposes on the exercise of plaintiffs' right of political association. Accordingly, Section 9-431 constitutes an

impermissible infringement on First Amendment rights and it cannot be applied to prevent the Republican Party from including unaffiliated voters in certain of its primaries.

The court today holds not that participation by unaffiliated voters in party primaries necessarily is constitutionally required, but that a party's decision to permit unaffiliated voters to participate in its primaries is constitutionally protected.

Discussion

Although the memoranda filed by the parties are lengthy, this is not a

particularly complex case. The principal issues are relatively straightforward. They are, first whether the dictates of Article I, section 2 of the Constitution and the Seventeenth Amendment (defining voter eligibility in elections for the federal House of Representatives and Senate, respectively) are applicable to primary elections; second, whether Article I, section 2 and the Seventeenth Amendment require that eligibility to vote in congressional elections be "absolutely symmetrical" to eligibility to vote in state legislative elections; third, whether Article I, section 4 (vesting in states the power to regulate the time, place, and manner of holding

congressional elections) grants states virtually unreviewable power to regulate the conduct of primaries; fourth, whether the challenged statute constitutes so insubstantial an imposition on the right of association that courts need not strictly scrutinize the statute under the First and Fourteenth Amendments; and fifth, whether the interests proffered by Connecticut in support of its closed primary law are legitimate and sufficient to outweigh the burden that the statute imposes on plaintiffs' right of political association. The court will address each of these questions in turn.

I. Political Parties and State Action

Article I, section 2, clause 1 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature.

The Seventeenth Amendment employs virtually identical language to delineate the class of persons eligible to vote in elections for the United States Senator.[7]

Connecticut maintains that the Republican Party rule at issue in this litigation violates these constitutional provisions by permitting unaffiliated

voters to participate in primaries for congressional offices while denying them a similar opportunity to vote in primaries for seats in the Connecticut General Assembly. Putting aside for the moment Connecticut's dubious interpretation of the relevant constitutional provisions, it is not apparent that Article I, section 2 and the Seventeenth Amendment have any application to primary elections whatsoever. Connecticut uncritically asserts that "the activities of a political party constitute state action" and thus that "there can be no question" that Article I, section 2 applies to primaries. Defendant's Reply to Plaintiffs' Memorandum Dated June 27, 1984 in Opposition to

Motion to Dismiss (filed July 9, 1984) ("Defendant's Reply Memorandum") at 4. This conclusion rests on the selective use of passages from Supreme Court decisions taken out of context, a mischaracterization of dicta in United States v. Classic, 313 U.S. 299 (1941), and an unwarranted extension of the so-called White Primary Cases.[8]

The White Primary Cases, in which the Supreme Court overturned a series of increasingly subtle tactics employed to exclude blacks from participating in the Texas Democratic Party's candidate selection process, do not stand for the proposition that all actions of political parties constitute state action without

regard to the surrounding circumstances. See O'Brien v. Brown, 409 U.S. 1, 4 n.1 (1972); Kester, Constitutional Restrictions on Political Parties, 60 Va. L. Rev. 735, 756-760 (1974); see also Ripon Society v. National Republican Party, 525 F.2d 567, 598-600 (D.C. Cir. 1975) (Tamm, J., concurring), cert. denied, 424 U.S. 933 (1976). The White Primary Cases concerned discrimination against members of a suspect class. They thus reflect the principle that, in cases of invidious discrimination, a lesser degree of state involvement in private conduct is sufficient to trigger constitutional scrutiny. See, e.g., Janusaitis v. Middlebury Volunteer Fire Department,

607 F.2d 17, 23, 27 n.16 (2d Cir. 1979).[9] No discrimination against a "discrete and insular minority," United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), present on the facts of this case.

Absent a malfunctioning of the machinery of the Connecticut Republican Party that results in a perversion of its electoral processes, such as the arbitrary exclusion of members of particular ethnic or religious groups, there is no basis for the state to interfere in the party's decisionmaking. The party's internal processes will supply any necessary corrective. "Where...all persons who share the party's basic philosophy

can participate more or less equally in fashioning party rules, there is no reason to set those rules aside merely because a legislative majority thinks it can do a better job." Brief of Amici Curiae American Civil Liberties Union and Connecticut Civil Liberties Union Foundation in Support of Plaintiffs' Motion for Summary Judgment (filed June 27, 1984) at 5; see generally J. Ely, Democracy and Distrust 135-179 (1980).[10]

Furthermore, the White Primary Cases were decided at a time when Texas was a one-party state and the Democratic Party nomination was tantamount to election to public office. See Ripon Society v. National Republican Party, supra, 525

F.2d at 598 (Tamm, J., concurring). Defendant could not seriously contend that anything resembling that situation is true of Connecticut at this time. Read as they must be in light of their factual underpinnings, the White Primary Cases do not support defendant's far-reaching view that the activities of political parties always constitute state action.

Connecticut's reliance on United States v. Classic, supra, is similarly misplaced. In Classic, the Supreme Court reversed the dismissal of an indictment against a Louisiana election official for fraudulently tabulating ballots in a primary election. The Court reasoned that primaries were such an "integral part" of

the electoral process that the right to vote implicit in Article I of the constitution, see Ex Parte Yarbrough, 110 U.S. 651, 662-664 (1884), extended to them. Kester, supra, 60 Va. L. Rev. at 745-746. In dicta, the Court suggested that a party official also could be prosecuted for miscounting ballots in a primary election because the right to vote in congressional elections guaranteed by Article I is protected against state and private interference alike. United States v. Classic, supra, 313 U.S. at 315.

Any argument, based on this dictum in Classic, that the activities of political parties are, by definition, state

action, is unfounded. See Developments in the Law -- Elections, 88 Harv. L. Rev. 1111, 1158-1159 (1975); L. Tribe, American Constitutional Law § 13-23, at 789 n.16 (1978). As Judge Tamm observed in his concurrence in Ripon Society v. National Republican Party, supra,

> the Classic holding was firmly grounded in the Article 1 protection of the right to vote in congressional elections, which also extends to private interferences, and thus cannot stand for the proposition that all nominating procedures closely related to general elections constitute state action.

525 F.2d at 599.

Defendant also argues that Article I, section 2 is applicable to political parties in primary elections even absent

a finding of state action. See Defendant's Memorandum in Support of Motion to Dismiss (filed June 21, 1984) ("Defendant's memorandum") at 17-18. This argument is premised on the isolated statement in Classic that "the constitutional command...is secured against the action of individuals as well as of states." 313 U.S. at 315. Reading "the constitutional command" to mean its postulated "absolute symmetry" requirement, Connecticut concludes that Article I, section 2 directly prohibits political parties from establishing voting qualifications in primaries for congressional offices different from those for state legislative offices.

This analysis is not borne out by a close reading of the opinion in Classic. It is apparent that in referring to "the constitutional command," the Court was speaking of the right to vote implicit generally in Article 1 of the Constitution and not any alleged constitutional prescription of "absolute symmetry" in the definitions of voter eligibility in congressional and state legislative elections. See Ex Parte Yarbrough, supra, 110 U.S. at 662-664; United States v. Mosley, 238 U.S. 383, 386 (1915). It is the right to vote that is "without restriction or limitation" and thus protected from private as well as state-imposed interference.

Connecticut's suggestion that the phrase "the constitutional command" in Classic refers to the explicit terms of Article 1, section 2, adopting state voter qualifications for use in congressional elections, is groundless. Those provisions, by their terms, have no logical application to the conduct of private persons or entities.[11]

II. The Meaning of Article I, Section 2

Even assuming arguendo the existence of some principled basis for applying Article I, section 2 and the Seventeenth Amendment to primary elections, Connecticut has failed to demonstrate that

these constitutional provisions mandate "absolute symmetry" or "unqualified symmetry and equality" in voter qualifications for congressional and state legislative primaries. Defendant's painstaking review of the history of Article I, section 2 demonstrates only that nationally uniform voter qualifications for congressional elections were rejected by the Constitutional Convention in 1787 in favor of the diverse standards utilized by the states themselves in electing the corresponding branches of their legislatures. This expedient eliminated the difficulty of identifying a single standard mutually acceptable to all states[12] and insured that the House

of Representatives would be elected by "the great body of the people of the United States." The Federalist No. 57, at 385 (J. Madison) (J. Cooke ed. 1961). The Founding Fathers were concerned that discrimination against federal interests might lead states to restrict the franchise in congressional elections, "render[ing] too dependent on the State Governments, that branch of the Federal Government, which ought to be dependent on the people alone." The Federalist No. 52 at 354 (J. Madison) (J. Cooke ed. 1961). In tying eligibility to vote in congressional elections to the qualifications for electors of the most numerous branches of state legislatures, the

drafters of the Constitution sought to prevent states from restricting popular participation in congressional elections; this goal was accomplished by the requirement that any such restriction of the franchise in congressional elections be accompanied by an identical narrowing of the electorate in state legislative contests.

None of this suggests the slightest concern with symmetry in the abstract, as a value meriting protection in its own right. Neither the language nor the history of Article I, section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections, and

defendant's repeated insistence that the Constitution requires "absolute symmetry" does not make it otherwise. To guarantee that the House of Representatives would be elected by the general populace, the framers devised a method of dissuading states from capriciously restricting the franchise in congressional elections. Those qualified to vote for members of the most numerous branches of state legislatures are entitled to vote for members of the House of Representatives; a more restrictive standard is constitutionally impermissible. It does not logically follow from this, however, that a less restrictive standard is similarly proscribed. In fact, it is arguable that

a standard that opens the political process by including greater numbers of voters in congressional primaries furthers, rather than undermines, the democratic values underlying Article I, section 2.

Defendant's unexplained assertion that "the power to discriminate in favor of 'openness' implies the power to discriminate for narrow purposes," Defendant's Memorandum at 9, is without merit. The ability to expand but not contract the pool of eligible voters in congressional primaries is the functional analogue of Justice Brennan's famous "ratchet" theory concerning the power of Congress to enforce the Fourteenth Amendment. Under that theory, Congress may

enact laws that strengthen guarantees under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted by the Supreme Court, but may not dilute those guarantees. See Katzenbach v. Morgan, 384 U.S. 641, 651 & n.10 (1966).[13] In a similar vein, although states under no circumstances may limit rights beyond constitutionally required minima, they may in certain instances extend the reach of rights guaranteed by the Constitution.[14]

III. Article I, Section 4

Connecticut maintains that Article I, section 4 of the Constitution -- which vests in state legislatures the power to

regulate the time, place and manner of holding congressional elections[15] -- authorizes states to trump the choices of a political party regarding the structure of its candidates selection process. See Defendant's Memorandum at 36-39. The weakness of this argument is revealed by the paucity of authority marshaled in support of it. Connecticut places principal reliance on dicta in Storer v. Brown, 415 U.S. 724, 730 (1974), to the effect that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster" under existing Supreme Court precedents. This is hardly a ringing affirmation of the expansive view of state regulatory power urged by Connecticut.

Connecticut then embarks on an extended review of election law cases in search of pronouncements arguably supportive of the position that state power to regulate primary elections knows few bounds. This exercise accomplishes little but reiteration of the basic principle that states are empowered to enact laws regulating primary elections if, and only if, such legislation does not transgress some specific constitutional limitation. See Rodriquez v. Popular Democratic Party of Puerto Rico, 457 U.S. 1, 13 (1982) ("[a]bsent some clear constitutional limitation"); Oregon v. Mitchell, 400 U.S. 112, 125 (1970) ("within the limits of the

constitution").[16] The right to associate with others for the advancement of common political beliefs or objectives is just such a constitutional limitation on the authority of government. See Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 121-122 (1981).

IV. The Standard of Review

Connecticut concedes that "substantial burdens on the right to ... associate for political purposes can only be justified if they serve a compelling state interest." Defendant's Memorandum at 67, citing Nader v. Schaffer, supra,

417 F. Supp. at 849. The state maintains, however, that Section 9-431 imposes only incidental burdens on plaintiffs' freedom of political association and thus that the statute need only be rationally related to the achievement of a legitimate state purpose in order to pass constitutional muster. See Defendant's Reply Memorandum at 9-12.

In contending that Section 9-431 is subject to this deferential standard of review, defendant relies solely on cases involving challenges by individual voters to state-imposed party affiliation requirements that were not opposed by the parties themselves. See Defendant's Memorandum at 69 n.9. Put very simply, this is a different case.[17]

The argument that a party affiliation requirement constitutes only a de minimis burden on associational rights rests on the notion that any "communality" of interests "between the excluded individual and the group from which he is excluded," Development in the Law -- Elections, supra, 88 Harv. L. Rev. at 1166, is belied by the independent voter's refusal "to express a commitment to the party and to the party's basic ideas," Defendant's Memorandum at 64. As stated by one commentator:

> There can be little objection to a requirement that those wishing to vote in a party's primary profess that, as of that time, they are affiliated with that party. Absent a willingness to profess such affiliation, it would be tenuous

> to assert that substantial associational rights were being abridged; without a communality of interests, there is little association to abridge.

L. Tribe, supra § 13-23, at 793, quoted in Defendant's Memorandum at 68; see also Nader v. Schaffer, supra, 417 F. Supp. at 843.[18]

The analysis is persuasive in the case of challenges by independent voters to state laws excluding them from participation in primary elections. The ability to comply with the essentially pro forma requirement of affiliation is exclusively in the hands of the complaining independent voter. Moreover, the countervailing right of a political party to

be free from unwelcome intrusions must be weighed in the balance. Finally, the independent voter's claim to a "communality" of interests with the party in whose primary he seeks to vote is indeed tenuous in light of his refusal to take the simple and largely formalistic step of affiliating with the party.

The analysis is substantially less persuasive when a party is challenging a state law excluding independent voters from its primaries. As noted above, independent voters possess the ready means to overcome the burden on associational rights imposed by a closed primary law. The same cannot be said of the party itself. In cases relied upon by

Connecticut, the plaintiffs were unaffiliated voters who sought to participate in primary elections having intentionally failed to comply with statutory prerequisites for voting in such elections.[19] Accordingly, some doubt was cast upon their asserted "communality" of interests with the party in whose primary they sought to vote. In this case, on the other hand, there is nothing the Connecticut Republican Party can do within the terms of Section 9-431 to permit unaffiliated voters to participate in its primaries. The statute's affiliation requirement is thus a real and formidable obstacle to a party which seeks to broaden its appeal by including unaffiliated

voters in its candidate selection process.

The analysis relied on by defendant also presupposes that parties are the willing beneficiaries of laws that preserve their institutional integrity by barring "gatecrashers" with adverse political views from sabotaging their decisionmaking. See Ray v. Blair, 343 U.S. 214, 221-222 (1952) (states may protect parties "from intrusion by those with adverse political principles").[20] This is not the situation when a political party is contesting a state-imposed affiliation requirement, in which case the party obviously does not welcome "protection" against efforts by outsiders to

participate in the party's candidate selection process. If the Connecticut Republican Party opts to invite "outsiders" to vote in its primaries, these "outsiders," by definition, are not intruders.

Defendant's reliance on Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, stands the case on its head. When the Supreme Court observed that "freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association," 450 U.S. at 122 (citations omitted), it was speaking of the power not of states but of political parties. As one commentator has noted, it

is unclear "[w]hat meaning...freedom of association [can] have if the association has no control over who can participate in its decisionmaking." Note, Democratic Party v. Wisconsin: May States Impose Open Primary Results Upon a National Party Convention?, 59 Denver L.J. 611, 620 (1982) (emphasis added).

Moreover, while there may be justification for rejecting claimed violations of associational rights asserted by voters who refuse to take the mechanical step of affiliating with the party, it does not follow that only those persons who have enrolled in a political party are capable of "shar[ing] the interests and persuasion that underlie the

association's being," Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, 450 U.S. at 122 n.23, quoting L. Tribe, supra,. § 13-23, at 791. Political beliefs are not susceptible to such rigid compartmentalization. See Rosario v. Rockefeller, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("the political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership"); Note, The Constitutionality of Non-Member Voting in Political Party Primary Elections, 14 Willamette L.J. 259, 290 (1978). It is not for the Connecticut legislature to determine whether or not the goals and aspirations of the

Connecticut Republican Party can be shared by independent voters who, for whatever reason, have chosen not to become members of that party.

The ultimate goal of any political party is to take control of the levers of government in order to achieve its objectives. See Storer v. Brown, supra, 415 U.S. at 745. In order to accomplish this goal, a minority party such as the Connecticut Republican Party[21] may wish to nominate candidates who will attract support in the general election from persons who are not members of that party. See Bode v. National Democratic Party, 452 F.2d 1302, 1309 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972). The

party rule at issue in this litigation is designed to increase the likelihood that candidates with such broad appeal will emerge from the party's primaries. Any effort by the state to substitute its judgment for that of the party on this question -- the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process -- substantially impinges on First Amendment rights.[22] Accordingly, Section 9-431 must be subjected to strict judicial scrutiny under the First Amendment.

V. The Purported Interests of the State

Under the strict scrutiny

Under the strict scrutiny analysis the court is thus required to undertake, Section 9-431 can be upheld only if it is narrowly tailored to serve compelling state interests. Connecticut maintains that its closed primary law furthers a number of "important state interests, all of which may be classified under the general rubric of 'preserving the integrity of the electoral process.'" Defendant's Memorandum at 75, quoting Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra, 450 U.S. at 121. These interests are principally three: (1) preventing raiding; (2) avoiding voter confusion; and (3) promoting a stable two-party system. Id.

at 76, quoting Developments in the Law -- Elections, supra, 88 Harv. L. Rev. at 1168-1169; see Nader v. Schaffer, supra, 417 F. Supp. at 845. None of these interests is sufficient to outweigh the burden on plaintiffs' associational rights imposed by Section 9-431.

Raiding is a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." Rosario v. Rockefeller, supra, 410 U.S. at 760. Connecticut's avowed interest in preventing raiding is of questionable relevance in this case, inasmuch as the party rule at issue permits only unaffiliated

voters to participate in Republican Party primaries; no such invitation has been extended to Democrats or members of other political parties. In any event, the spectre of Democratic voters severing ties with their party en masse in order to mount a raid on a Republican primary is effectively eliminated by Section 9-59 of the Connecticut General Statutes (a law not directly at issue here), which provides that a person affiliated with one party may not vote in the primary of another party within six months after leaving his original party.[23]

Any professed concern with raiding by unaffiliated voters -- an anomalous concept to begin with -- is contradicted

by Public Act 84-118, effective January 1, 1985, which permits unaffiliated voters to affiliate with a political party up to one day prior to a primary election.[24] This statute already has eliminated any real obstacle to "raiding" by independent voters bent on disrupting the candidate selection process of a political party.

The second interest articulated by defendant in support of Section 9-431, that of avoiding voter confusion "by ensuring that the candidate who wins a party primary is that candidate who best represents the views of party members," Defendant's Memorandum at 90, is wholly illegitimate.[25] Connecticut may well

have an interest in "fostering an informed electorate." Defendant's Memorandum at 90'; see Anderson v. Celebrezze, 460 U.S. 780, 796 (1983). However, that interest does not authorize the state to gauge, much less determine, whether candidates for public office adequately reflect the views of their parties. Connecticut presents no reasoned argument in support of its bald assertion that is has a legitimate interest in protecting "voters who rely on party labels as representatives of certain ideologies." Defendant's Memorandum at 91. It is not obvious that unthinking reliance on party labels is a practice that ought to be encouraged in any event, but protecting

voters who, in a general election, reflexively pull a party's lever in the voting booth, and may thereby be "misled," simply does not rise to the level of a compelling state interest. Whether to pursue an electoral and political strategy that assures voters that party nomination implies a recognizable ideology (or other types of political values) is a matter for each political party, not the state, to decide. Connecticut has no compelling interest in so rigidly constraining the contours of party politics.[26]

The third interest advanced by Connecticut to justify its closed primary law, apparently closely related to the

second, is maintenance of the stability of the state's two-party system. Viewing the pivotal question as "which primary system [i.e., "open" or "closed"] is better," Connecticut maintains that the legislature's choice of a closed primary represents the best judgment of political scientists as to "the means of emphasizing the differences between the parties...and thereby encouraging voting." Defendant's Reply Memorandum at 13 & n.7.[27] Defendant has misconstrued the issue before this court.[28] The controversy does not center on which form of primary election is more desirable, but rather, on whether there are compelling state interests to justify imposition of

a closed primary structure on an objecting party. It is not apparent that maintaining the two-party system within its present contours rises to the level of a compelling state interest sufficient to validate the limitation on First Amendment rights present in this case. Much less is it clear that the state's imposition of a closed primary structure on an unwilling party furthers the state's purported interest.

Connecticut has failed to explain how permitting unaffiliated voters to participate in Republican primaries will lead to the splintered parties and unrestrained factionalism[29] that it professes to fear, or how any such result

would justify a substantial infringement on plaintiffs' right of association. The Connecticut Republican Party's attempt to broaden its appeal by including unaffiliated voters in its primaries, whatever its practical effects, cannot be foreclosed on defendant's flimsy and unsupported assertion that this action somehow will "discourage a politics of coalition and accommodation," Defendant's Memorandum at 81, quoting A. Bickel, Reform and Continuity 21-22 (1971).

To the extent that Section 9-431 is defended on the grounds that it preserves the Connecticut Republican Party in its present form, the defendant's position is patently untenable. Absent an invidious

design effectively to limit participation in the electoral process, the efforts of a political party to alter its character -- indeed, to reshape itself altogether -- by redefining who may participate in its affairs is no concern to a state.

There is nothing legitimate or reasonable, much less compelling, about an asserted state interest in freezing the parties in status quo.[30] Whether or not permitting unaffiliated voters to participate in primary elections somehow will "destabilize" the Republican Party is a matter for Republicans to consider; it is not an appropriate subject for state legislation. Whether the course chosen by a party leads to success and power or to

failure and decline, the First Amendment ensures that that course will be the choice of the party, not the state.

Conclusion

Section 9-431 of the Connecticut General Statutes imposes substantial burdens on plaintiffs' right of association under the First and Fourteenth Amendments of the United States Constitution and is not supported by compelling state interests. Accordingly, as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican primaries, the statute abridges the right of association

guaranteed by the First Amendment and that abridgement must be enjoined. Plaintiffs' motion for summary judgment is therefore granted and defendant's motion to dismiss is denied.

It is so ordered.

Dated at Hartford, Connecticut, this 5th day of December, 1984.

Jose A. Cabranes
United States District Judge

NOTES

1. Due to the possible implications of this case for primary elections and the two-party system generally, the court extended an invitation to interested persons and organizations to participate as amici curiae. See Order (filed May 23, 1984). As the court has noted on previous occasions, the decision to invite these parties to participate as friends of the court was in no way motivated by questions concerning the capacity of existing counsel adequately to represent the interests of their clients. Rather, these arrangements -- made without objection from either party -- reflected the shared conviction that this lawsuit may possess broad-ranging significance and that the court would benefit from the presentation of widely divergent ideological, political and professional viewpoints on the constitutional issues in the litigation. Those who elected to participate as amici curiae argued generally in favor of the position asserted here by plaintiffs. See Certified Official Transcript of Oral Argument of July 5, 1984 (filed Dec. 4, 1984) ("Tr.") at 4-6.

2. The amici curiae represented by Professor Gottlieb are professors of political science at Yale University, Williams College, the State University of New York at Albany, Northwestern University, the Graduate School of Public Affairs at the State University of New York at Albany, and Southern Illinois University at Carbondale, respectively.

   The statement submitted by these political scientists contained interesting arguments grounded in history and public policy. In the final anaylsis, however, the determination of issues in this case must be made exclusively in the basis of constitutional principles.

3. Compare Seergy v. Kings County Republican County Committee, 459 F.2d 308, 313-314 (2d Cir. 1972) ("political parties are not immune from constitutional limitations merely because they are private groups") with Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 167 (1972) (racially discriminatory guest policies of private club are not within purview of Equal Protection Clause of Fourteenth Amendment).

4. Section 9-431 provides, in pertinent part:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be . . .

5. The rule provides:

> Any elector enrolled as a member of a Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

6. See Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

7. The Seventeenth Amendment provides, in pertinent part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

8. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

9. See also Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 69 (2d Cir.), cert. denied, 425 U.S. 974 (1976); Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F.2d 623, 628-629 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); Lefcourt v. Legal

Aid Society, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); Stewart v. New York University, 430 F. Supp. 1305, 1311 n.6 (S.D.N.Y. 1976).

10. Cf. Mrazek v. Suffolk County Board of Elections, 630 F.2d 890, 897 n.11 (2d Cir. 1980) ("The parties are best situated to define the proper constituencies of their nominating delegates, and these determinations should not be invalidated unless...[the process is] utilized to exclude or disadvantage discrete groups or minorities.").

11. It is possible that the notion of "absolute symmetry" so vigorously embraced by defendant, if adopted by the courts, could have some unexpected, not to say bizarre, consequences, as suggested by the following exchange between the court and plaintiffs' counsel during oral argument:

> Mr. Elliot: The United States Constitution requires only that the U.S. Senate electors and the U.S. House electors have the same qualifications as electors do who vote for the State House of Representatives, and there is nothing in

this case to indicate that that is not so . . . .

The State argues [,however,] that the U.S. Constitution requires that everyone who can vote for the State House of Representatives must be able to vote in the Republican primary for U.S. Representative and U.S. Senator . . . .

The State's argument would thus invalidate Section 9-431 because it limits the right to vote in Democratic primaries to Democrats and in Republican primaries to Republicans, and does not open up all of the primaries to all of the voters who can vote for the State House of Representatives.

The Court: But then your argument is that the so called open primary is constitutionally mandated?

Mr. Elliot: No. Our argument is that the State's argument is that the open primaries

> is constitutionally mandated so that all voters in all parties can vote in each par;ty's primaries.

Tr. 21-23 (emphasis supplied). See also Tr. 25-26, 29-30, 38-40, 43-44.

12. I Story, Commentaries on the Constitution of the United States § 584, at 418 (T. Cooley 4th ed. 1873) ("the reducing of the different qualifications, already existing in different States, to one uniform rule, would have been a difficult task, even to the convention itself, and would be dissatisfactory to the people of different States").

13. See also Oregon v. Mitchell, 400 U.S. 112, 249 n.31 (1970) (Brennan, J., concurring in part and dissenting in part); G. Gunther, Cases and Materials on Constitutional Law 1096-1104 (10th ed. 1980); Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1230-1231 & n.63 (1978). For the related views of Judge Jon O. Newman, see note 14, infra, and accompanying text.

14. See Newman, The "Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity, 15 Conn. L. Rev. 21, 25 (1982).

15. Article I, section 4, clause 1 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senator.

16. The concept is best conveyed by defendant in a single sentence:

> In summary, the State of Connecticut has the power to enact laws, within constitutional limits, setting qualifications for voting in a primary election.

Defendant's Memorandum at 64 (emphasis added).

17. Defendant here runs afoul of the principle that cases must be construed in light of their facts.

A similar criticism can be made of the arguments of Professor Ronald Rotunda, on which defendant relies. See Defendant's Reply Memorandum at 11 n5. Professor Rotunda attributes to plaintiffs the position that "[e]ven though a nonparty member could not force an open primary and invalidate...[a state closed primary] law, the political party could, if it chooses to do so." He then concludes that such a position "does not find support in the case law." Letter from Ronald D. Rotunda to Judge Jose A. Cabranes (dated June 15, 1984) at 2. This conclusion is unpersuasive inasmuch as no reported case has ever addressed the situation in which a political party, rather than an independent voter, challenges a closed primary law on First Amendment grounds.

18. Cf. Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 133 (1981) (Powell, J., dissenting) ("As party affiliation becomes this easy for a voter to change in order to participate in a primary election, the difference between open and closed

primaries loses its practical significance.").

19. See, e.g., Rosario v. Rockefeller, 410 U.S. 752 (1973); Ray v. Blair, 343 U.S. 214 (1952); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn.) (three-judge court), aff'd mem., 426 U.S. 989 (1976).

20. See also Gottlieb, Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case, 11 Hofstra L. Rev. 191, 198 (1982).

21. As of October 1983, there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered but unaffiliated voters in the State of Connecticut. Joint Statement of ¶ 1 (filed June 6, 1984). As counsel for plaintiffs asserted at oral argument, "the Republican Party recognizes that in general elections, because of the ...breakdown of Republican, Democrat and unaffiliated voters, that for the Republican Party to win in general elections it needs the support of unaffiliated voters." Tr. 56; see also Tr. 66; note 28, infra, and accompanying text.

22. As the Supreme Court noted in Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra,

> [i]t is for the National Party -- and not the Wisconsin Legislature or any court -- to determine the appropriate standards for participation in the Party's candidate selection process.

450 U.S. at 124 n.27; see also Opinion of the Justices to the Governor, 385 Mass. 1201, 1207-1208, 434 N.E. 2d 960, 963-964 (1982), appeal dismissed sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). But see id. at 1063 & n.3 (Stevens, J., dissenting) (observing that the Democratic Party case involved a state's attempt "to control delegates in a nationwide party contest"); Rotunda, Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda, 53 Tex. L. Rev. 935, 950-951 (1975) (arguing that statutes regulating national political parties constitute extraterritorial extensions of state jurisdiction and must

therefore be justified by "special Interests").

23. Section 9-59 of the Connecticut General Statutes provides, in pertinent part:

> . . . Any elector whose name has been transferred from one enrollment list to another or who has applied for erasure . . . shall not be entitled to vote in a . . . primary of any party . . . for a period of six months from the date of the filing of his application for transfer or for erasure.

24. Public Act 84-118 provides, in pertinent part:

> . . . The application shall be effective as of the date of its execution and any person making application for enrollment in such manner shall immediately be entitled to privileges of party enrollment unless he executes the application for enrollment after [the

> fourteenth] TWELVE O'CLOCK NOON ON THE LAST BUSINESS day before a primary, in which case he shall be entitled to the privileges of party enrollment immediately after the primary . . . .
>
> 1984 Conn. Legis. Service No. 4, at 10 (West) (bracketed language deleted from and capitalized language added to prior statutory provision).

25. Comments in Nader v. Schaffer, supra, 417 F. Supp. at 845, to the effect that a state has a "legitimate ... interest in protecting the overall integrity of the historic electoral process" cannot be employed to support defendant's arguments in this litigation. The Nader case involved a challenge by independent voters to the affiliation requirement of Section 9-431 and thus the central concern was the prevention of raiding. A conviction that political parties are ill-equipped to protect themselves from the disruptive effects of raiding led the court to conclude that "in the regulated situation, the state has a legitimate interest in protecting party members' associational rights,

by legislating to protect the party 'from intrusion by those with adverse principles.'" Id., quoting Ray v. Blair, supra, 343 U.S. at 221-222 (1952).

26. A logical but unarticulated extension of defendant's argument would permit a state to displace a party's choice of candidates whenever the state determines that the candidate's views are so antithetical to those of the party that permitting him to run on the ticket in the general election would engender "voter confusion." While such a result would comport with the notion that political parties are mere functionaries carrying out tasks delegated to them by the state, it is utterly inconsistent with the freedom of political parties to associate for the advancement of common beliefs guaranteed to them by the First Amendment.

27. Connecticut's counsel has asserted that it would be "a very legitimate interest of the State" to enact legislation designed to foster party differentiation along ideological and other political lines. See Tr. 80-81.

28. The amici curiae political scientists correctly note that the real

issue is the "right of political parties to choose the basis on which to seek the support of the American public." Statement of F. Christoper Arterton, et al. and Supporting Memorandum of Law (filed June 26, 1984) at 1.

29. In any event, it is possible that the challenged rule actually would decrease the likelihood of political fragmentation by encouraging independent voters to participate in the affairs of an existing political party. As one commentator has noted:

> Inasmuch as parties in competitive systems seek to win the electoral support of groups that may not be particularly predisposed toward political participation, the parties serve to pull these groups into more active involvement in the polity and thus to integrate them into the political system and its processes.

Dawson, Social Development, Party Competition, and Policy, in The American Party Systems 208-209 (W. Chambers & W.D. Burnham eds. 1967).

"The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction." T. Emerson, The System of Freedom of Expression 47 (1970).

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-five

Present:

HON. IRVING R. KAUFMAN,

HON. JAMES L. OAKES,

HON. RICHARD J. CARDAMONE,

Circuit Judges,

REPUBLICAN PARTY OF THE
STATE OF CONNECTICUT,
LOWELL P. WEICKER, JR.,
STEWART B. McKINNEY,
NANCY L. JOHNSON and
THOMAS J. D'AMORE, JR.,

Plaintiffs-Appellees,

-against- 85-7011

JULIA H. TASHJIAN,
Secretary of the State of
the State of Connecticut,

Defendant-Appellant,

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk,

by: /s/ Edward J. Guardaro,
Deputy Clerk

FILED SEPTEMBER 20, 1985

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR., Plaintiffs-Appellees,	:	DOCKET NO. 85-7011
V.	:	
JULIA H. TASHJIAN, SECRETARY OF THE STATE OF CONNECTICUT. Defendant-Appellant.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JULIA H. TASHJIAN, SECRETARY OF THE STATE OF CONNECTICUT, the defendant-appellant above named, hereby appeals to the Supreme

Court of the United States from the judgment of the U.S. Court of Appeals for the Second Circuit entered in this action August 8, 1985, affirmi.g the judgment of the United States District Court for the District of Connecticut.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

FOR DEFENDANTS-APPELLANT
JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

Elliot F. Gerson
Deputy Attorney General

Barney Lapp
Assistant Attorney General

Daniel R. Schaefer
Assistant Attorney General

Henry S. Cohn
Assistant Attorney General
30 Trinity Street
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CERTIFICATE OF SERVICE

I, Daniel R. Schaefer, attorney for defendant-appellant and member of the Bar of the Supreme Court of the United States hereby certify that on September 18, 1985, copies of the foregoing Notice of Appeal were served on plaintiffs- appellees by mailing one copy each, first-class postage prepaid, to their attorneys: Stanley A. Twardy, Jr., Silver, Golub & Sandak, 184 Atlantic Street, Stamford, Connecticut 06904; and Ralph G. Elliot, Tyler, Cooper & Alcorn, City Place, 35th Floor, Hartford, Connecticut 06103-3488.

All parties required to be served have been served.

I further certify that courtesy copies of the foregoing Notice of Appeal were mailed first-class postage prepaid, on September 18, 1985, to amici curiae Professor Stephen E. Gottlieb, Albany Law School, 80 New Scotland Avenue, Albany, New York 12208; Martin Margulies, University of Bridgeport School of Law, 303 University Avenue, Bridgeport, Connecticut 06601; Martha Stone, Connecticut

Civil Liberties Union Foundation, 32 Grand Street, Hartford, Connecticut 06106; and James A. Wade, Robinson & Cole, One Commercial Plaza, Hartford, Connecticut 06103-3597.

_____

Daniel R. Schaefer
Attorney for Defendant-Appellant
Member of the Bar of the Supreme Court of the United States

CONSTITUTION OF THE UNITED STATES

ARTICLE I,

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

FIRST AMENDMENT,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TENTH AMENDMENT,

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT,

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEVENTEENTH AMENDMENT,

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite

for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CONNECTICUT GENERAL STATUTES, REV. TO 1985
(Excerpts from State Election Laws)

Sec. 9-56. Application for enrolment by unaffiliated elector. Except as otherwise provided in the case of an elector whose name has not been placed on or has been removed from the enrolment list under section 9-59, 9-60, 9-61 or 9-62, any elector not enrolled on any enrolment list may at any time make a written and signed application for enrolment, in accordance with the requirements of this section, to the registrars of voters. The application shall be effective as of the date of its execution and any person making application for enrolment in such manner shall immediately be entitled to the privileges of party enrolment unless he executes the application for enrolment

after twelve o'clock noon on the last business day before a primary, in which case he shall be entitled to the privileges of party enrolment immediately after the primary or unless he executes the application for enrolment on the day of a caucus or convention, in which case he shall be entitled to the privileges of party enrolment immediately after the caucus or convention. Such application shall include an affidavit sufficient to prove the identity, residence and signature of such applicant, unless it is made in person at the office of the registrars to either registrar or to his deputy, assistants or his appointed clerks, or unless it is made in person at the residence or usual place of business of either registrar or deputy registrar in any municipality in which the registrars do not maintain a permanent office, or unless it is made in person, to the admitting official, on the application form provided in section 9-20, at the time the applicant was admitted as an elector. Either registrar of voters and either of their deputy registrars, assistant registrars or special assistant registrars may take the acknowledge of the affidavit provided for in this section. Each application for enrolment shall be made in duplicate if filed by the applicant and in triplicate if filed by a person other than the applicant. The application and each copy thereof shall be signed or initialed by the registrar, deputy,

assistant or registrar's clerk receiving it, or by such other personnel as such registrar or deputy may appoint for the purpose, showing the date when such application is received and, in the case of an applicant not immediately eligible under section 9-59, 9-60, 9-61 or 9-62 to the privileges accompanying enrolment in the party named in his application, the date upon which such applicant becomes so eligible. If application is made by the applicant in person as hereinbefore provided, the duplicate copy shall be handed to such applicant to such registrar, deputy, assistant or clerk receiving it, at the time such application is made. If such application is mailed by the applicant, such registrar, deputy, assistant or clerk receiving such application shall mail such duplicate copy to such applicant forthwith. If such application is brought to such registrar, deputy, assistant or clerk by any person other than the applicant, such registrar, deputy, assistant or clerk receiving such application shall mail a copy thereof to such applicant forthwith and shall hand the other copy to the person filing the application. The form of such application shall be prescirbed by the secretary of the state and, either on the face or on the back of each application form, there shall be printed a copy of section 53a-157. Unless application for enrolment is made pursuant to this section, section 9-12, 9-20 or section

9-23a, at the time of admission as an elector, each applicant for enrolment shall state in his application (1) the street and number, if any, at which he resides, (2) the name of the political party on the enrolment list of which he desires to be enrolled, (3) that he is not a member of or connected with any political party other than that in which enrolment is then being sought by him, (4) the name of the political party, if any, in which he was entolled, or had applied for enrolment, or had an application for enrolment pending, within the period of six months prior to the time of his present application and (5) the date upon which he applied for erasure of his name from the list of such political party in which he was so enrolled, or had so applied for enrolment, or so had an application for enrolment pending, within the period of six months prior to the time of his present application. In municipalities divided into voting districts in which an enrolment session is held in each district thereof under section 9-51, application for enrolment shall be made to the registrar or assistant registrar, as the case may be, in the voting district in which such elector is entitled to vote at the time of making such application. If any registrar or assistant registrar fails to add any name to any such list on written application or adds any name to any such list except as herein provided, he shall be fined not

more than two hundred dollars or imprisoned not more than thirty days or both.

Sec. 9-249a. Order of parties on the ballot label. (a) The names of the parties shall be arranged on the machines in the following order:

(1) The party whose candidate for governor polled the highest number of votes in the last-preceding election;

(2) Other parties who had candidates for governor in the last-preceding election, in descending order, according to the number of votes polled for each such candidate;

(3) Major parties who had no candidate for governor in the last-preceding election;

(4) Minor parties who had no candidate for governor in the last-preceding election;

(5) Petitioning candidates with party designation whose names are contained in petitions approved pursuant to section 9-453o, and

(6) Petitioning candidates with no party designation whose names are contained in petitions approved pursuant to section 9-453o.

(b) Within each of subdivisions (3), (4) and (5) of subsection (a) of this section, the following rules shall apply in the following order:

(1) Precedence shall be given to the party any of whose candidates seeks an office representing more people than are represented by any office sought by any candidate of any other party;

(2) A party having prior sequence of office as set forth in section 9-251 shall be given precedence, and

(3) Parties shall be listed in alphabetical order.

(c) Within subdivision (6) of subsection (a) of this section, candidates shall be listed according to the provisions of section 9-453r.

Sec. 9-256. Filing of sample ballot label with secretary. The clerk of each municipality shall, not less than ten days prior to an election, file with the secretary of the state a sample ballot label identical with those to be provided for each polling place under section 9-255. The secretary of the state shall examine the sample ballot label required to be filed under this section, and if such sample ballot label contains an error, the secretary of the state shall order the municipal clerk to reprint a

corrected sample ballot label or to take other such action as the secretary may deem appropriate.

PART I
GENERAL

Sec. 9-372. Definitions. The following terms, as used in this chapter and sections 9-51 to 9-67, inclusive, 9-169e, 9-217, 9-236 and 9-361, shall have the following meanings:

(B) on and after November 4, 1981, for offices contested at 1981 elections, and on and after November 3, 1982, for offices contested at the November 2, 1982, election and all subsequent elections, "major party" shall mean a political party or organization whose candidate for governor at the last-preceding election for governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for governor;

(11) "Primary" means a meeting of the enrolled members of a political party held during consecutive hours at which such members may, without assembling at the same hour, vote by secret ballot for candidates for nomination to office or for town committee members or delegates to conventions;

PART II

PARTIES ENTITLED TO PLACE ON BALLOT

Sec. 9-379. Eligibility for placing on ballot. No name of any candidate shall be printed on any official ballot at any election except the name of a candidate nominated by a major or minor party unless a nominating petition for such candidate is approved by the secretary of the state as provided in sections 9-453a to 9-453p, inclusive.

PART III

NOMINATION OF CANDIDATES

A

MAJOR PARTIES

Sec. 9-381. Nomination procedure. The provisions of section 9-382 to 9-450, inclusive, shall apply to the nomination by a major party of any candidate for an elective office, including an office established after the last-preceding election, and to the selection in any municipality by a major party of town committee members or delegates to conventions.

Sec. 9-381a. Election procedures applicable to primaries unless otherwise provided. Except as otherwise provided by statute, the provisions of the general statutes concerning porcedures relating to regular elections shall apply as nearly as may be, in the manner prescribed by the secretary of the state, to primaries held under the provisions of this chapter.

Sec. 9-382. Party-endorsed candidates; state or district office. The state or district convention, as the case may be, shall, in a manner conforming with applicable law and with the rules of the party calling such conventions, choose a candidate for nomination to each of the state or district offices, as the case may be. No such convention shall choose more than one candidate for nomination to any such office. Candidates so chosen shall run in the primary of such party as party-endorsed candidates, except as provided in section 9-416.

Sec. 9-400. Filing of candidacies; state or district office. (a) Within fourteen days following the close of the state convention, a candidacy for nomination by a political party to a state office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party in any municipality within the

state and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such state office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state, of a certificate, signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such state office. Such certificate shall specify the candidate's name, his full residence address and the title of the office for which his candidacy is being filed. Except as provided in section 9-416a, upon the expiration of the fourteen-day period, if one or more candidacies for such state office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks in accordance with the provisions of section 9-433, that a primary for such state office shall be held in each municipality in accordance with the provisions of section 9-415.

(b) Within fourteen days following the close of the district convention, a candidacy for nomination by a political

party to a district office may be filed by or on behalf of any person whose name appears upon the last-completed enrolment list of such party within any municipality or part of a municipality forming a component part of such district and who has received at least twenty per cent of the votes of the convention delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for such district office, whether or not the party-endorsed candidate for such office received a unanimous vote on the last ballot, by the filing with the secretary of the state of a certificate signed by such candidate and attested by either (1) the chairman or presiding officer, or (2) the secretary of the convention, that such candidate received at least twenty per cent of such votes, and that he consents to be a candidate in a primary of such party for such district office. Such certificate shall specify the candidate's name, his full residence address and the title and district of the office for which his candidacy is being filed. Except as provided in section 9-416a, upon the expiration of the fourteen-day period, if one or more candidacies for such district office have been filed pursuant to the provisions of this section, the secretary of the state shall notify all town clerks within the district, in accordance with the provisions of section 9-433, that a primary for such district

office shall be held in any municipality or each part of any municipality within the district in accordance with the provisions of section 9-415.

Sec. 9-416. No-contest nominations; state or district office. If at a state or district convention no person other than a party-endorsed candidate has received at least twenty per cent of the votes of the delegates present and voting on any roll-call vote taken on the endorsement or proposed endorsement of a candidate for a state or district office, or if within the time specified in section 9-400, no candidacy for nomination by a political party to such office has been filed by or on behalf of a person other than a party-endorsed candidate in conformity with the provisions of sections 9-400 to 9-414, inclusive, no primary shall be held by such party for such office and the party-endorsed candidate for such office shall be deemed to have been lawfully chosen as the nominee of such party for such office.

Sec. 9-431. Eligibility to vote at primary. No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by

the testimony, under oath, of at least one other elector qualified to vote in such primary or by such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee in any municipality shall be elected both at large and from political subdivisions.

Sec. 9-441. Compensation of registrars and municipal clerks. For the performance of the duties imposed by this chapter, each registrar and deputy registrar actually engaged therein and each municipal clerk shall receive such reasonable compensation from the municipality as is approved by the selectmen of the town, the warden and burgesses of the borough or the common council of the city or the consolidated town and city, as the case may be; and all necessary expenses incurred by registrars and municipal clerks under the provisions of said sections shall be paid by the municipality.

Sec. 9-444. Determination of nominee, committee members or delegates. In the case of a primary for state or district office, each person certified by the secretary of the state as provided in section 9-440, to have received the greatest number of votes of the members of the political party holding a primary for any office shall be deemed to have been chosen as the nominee of such party to such office. In the case of a primary for district delegates, each person on the slate certified by the secretary of the state to have received the greatest number of votes of the members of the political party holding a primary for such positions shall be deemed to have been elected as such delegates. In case of a primary for a municipal office, the moderator, or the head moderator, as the

case may be, shall declare nominated the person having the greatest number of votes for such office, and if more than one person is to be nominated for the same office, he shall declare nominated the persons having the greatest number of votes for such office up to the number to be chosen. In the case of a primary for members of a town committee, such moderator shall declare elected the persons having the greatest number of votes for such positions up to the number to be chosen for such positions. In the case of a primary for delegates to a convention other than district delegates, such moderator shall declare elected each person on the slate having the greatest number of votes for such positions. In all primaries, a plurality of the votes cast shall be sufficient to nominate or elect, as the case may be.

UNIVERSITY OF ILLINOIS
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217 333-0931
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June 15, 1984

The Honorable Jose A. Cabranes
Judge, United States District Court
District of Connecticut
450 Main Street
Hartford, CT 06103

Re: Republican Party v. Tashjian
Civ. No. H 84-584

Dear Judge Cabranes:

I am honored to have been invited to participate as an amicus in the above-captioned case. However, because I am not an institutional litigant and my personal resources are limited, I am simply unable to participate in the case as fully as I would like to.

I have read the papers sent to me by Deputy Attorney General Gerson pursuant to your court order of May 23d, 1984, and, as a Professor of Constitutional Law, I do not believe that the U.S. Constitution invalidates the state law at issue here. The state law has no extraterritorial application; it does not discriminate against any party nor does it discriminate on the basis of race, religion, sex or poverty. I also find it quite relevant that the State has not placed any unduly high burdens on any person who wishes to become a registered party member and vote in the primary: I understand that State law allows any voter to register as a party member up until the day before a primary election.

The present state law does not restrain the Republican Party from selecting candidates with bipartisan support. See Plaintiffs' Memorandum of May 20, 1984, at 8. The qualified voters in the primary can vote for whomever they wish.

Moreover, new Rule: "Article IV a PRIMARIES" does not open up all Republican primaries; it only opens up primary elections for certain electoral offices. If a primary election for the office of U.S. Senator takes place at the same time as a Primary election for city mayor or State Senator, for example, then the

burden on state election judges may well be heavy and the confusion on the voters great. And, if the Republican Party can, unilaterally, impose such burdens on state primaries, then the Democratic Party should also be able to impose its own rules contrary to state law.

The principle advocated by the plaintiff in this case seems to be that any state political party can invalidate all (or a portion) of any state law to which it objects. Even though a nonparty member could not force an open primary and invalidate the law, the political party could, if it chooses to do so. This principle does not find support in the case law.

I regret that I am unable to pursue these issues further, but I am honored to have been invited to participate. I hope that I have been of some assistance.

Sincerely,

/s/

Ronald D. Rotunda
Professor of Law

RDR:blm

cc: Council of Record and
Invited Potential Amici

(REPRINT)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,	:	
PLAINTIFFS,	:	CIVIL ACTION NO. H 84-548 (JAC)
V.	:	
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut,	:	
DEFENDANT.	:	JUNE 5, 1984

JOINT STATEMENT OF FACTS

The plaintiffs, through counsel, and the defendant, through counsel, pursuant to this Court's Scheduling Order dated May 16, 1984, submit the following statement of facts as to which they agree there are no genuine issues to be tried.

The parties hereby reserve all objections which they may have as to the relevance, materiality or probative value of any fact contained herein.

The parties agree as to the existence of the following:

1. As of October, 1983, there are 659,268 registered Democrats, 532,723 registered but unaffiliated voters and 425,695 registered Republican voters in Connecticut.

2. The plaintiff Republican Party of the State of Connecticut ("Republican Party") is a major political party within the meaning of Sections 9-372 et seq. of the Connecticut General Statutes.

3. The Republican Party is an association of individuals for the common advancement of political beliefs and ideas and for the election of its candidates to public office.

4. The Preamble to the Convention and Committee Rules of the Republican Party of the State of Connecticut provides that:

> Among the goals of the Republican Party of Connecticut are to seek out, designate, and secure the election of, qualified candidates for public office at the Federal, State and Local Levels of government ....

> In its stance as a statewide political organization, dedicated to governmental improvement on all levels, the Republican Party of Connecticut encourages fullest voter participation in its activities ....

A complete copy of the Preamble is included as Exhibit A in the Joint Submission of Documents.

5. The plaintiff Lowell P. Weicker, Jr. ("Weicker") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is a United States Senator from the State of Connecticut.

6. The plaintiff Stewart B. McKinney ("McKinney") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party.

He is a United States Representative from the State of Connecticut and is a candidate for party endorsement by the Republican Party Fourth Congressional District Convention for renomination and re-election to the office of United States Representative in November, 1984.

7. The plaintiff Nancy L. Johnson ("Johnson") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. She is a United States Representative from the State of Connecticut and is a candidate for party endorsement by the Republican Party Sixth Congressional District Convention for renomination and re-election to the office of United States Representative in November, 1984.

8. The plaintiff Thomas J. D'Amore, Jr. ("D'Amore") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is the Chairman of the Republican State Central Committee, the body designated by the Party to, inter alia, implement the Party rules.

9. The defendant Julia H. Tashjian ("Secretary of the State") is the Secretary of the State of the State of Connecticut. Pursuant to Sections 9-3 and 9-4 of the Connecticut General Statutes, she is the Commissioner of Elections of the State of Connecticut and, pursuant to statute, is charged with certain duties pertaining to elections and primaries in the State of Connecticut, including,

inter alia, the administration of Section 9-431 of the Connecticut General Statutes.

10. Pursuant to a resolution passed by the members present at the August 23, 1983 meeting of the Republican Party's State Central Committee, a subcommittee was established to study and recommend changes in the party's rules to improve the party's chances of winning general elections and to improve the two party system.

11. The plaintiffs would offer testimony that this subcommittee concluded that the Republican Party would: increase its chances of winning general elections; nominate candidates with greater bipartisan support; increase the

involvement of unaffiliated voters in the electoral process in general; and strengthen the two party system by allowing unaffiliated voters to participate in Republican Party primaries. Defendants stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

12. Based upon the recommendations of this subcommittee, and in accordance with Section 9-384 of the Connecticut General Statutes and applicable party rules and resolutions, Republican Party Chairman D'Amore called and noticed a state party convention to consider, inter alia, "proposed changes [in party rules] to allow unaffiliated voters to vote in Republican candidate selection primaries."

13. On January 14, 1984, at a duly called, noticed and conducted state party convention, the Republican Party approved an amendment (the "Rule") to its party rules to allow unaffiliated voters to associate, participate and join with enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule, entitled "Article IVa PRIMARIES", provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant

Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

14. The Convention was called pursuant to Section 9-384 of the Connecticut General Statutes and in accordance with the opinion of the defendant's office dated August 23, 1983. That opinion was in response to a letter on behalf of the plaintiff Republican Party to the defendant dated August 17, 1983. Copies of these letters are included as Exhibits B and C in the Joint Submission of Documents.

15. The Convention was conducted pursuant to a Call, dated October 6, 1983. A copy of that Call is included as Exhibit D in the Joint Submission of Documents.

16. The Rule approved by the plaintiff Republican Party was one of a number of resolutions which came before, and were acted upon by, the delegates to said state party convention. The minutes of that convention are included as Exhibit E and the resolutions are included as Exhibits F through N in the Joint Submission of Documents.

17. In accordance with Section 9-374 of the Connecticut General Statutes, a copy of the Rule approved and adopted by the Republican Party at the state convention, together with a copy of the complete party rules incorporating such Rule, was filed with the Office of the Secretary of the State of the State of Connecticut on January 23, 1984.

18. Plaintiff contends that this Rule became effective on March 23, 1984 pursuant to Section 9-374 of the Connecticut General Statutes. Defendant acknowledges that the plaintiff filed the Rule together with such copy, as stated in Paragraph 17, but denies that the Rule became effective because it is in conflict with Section 9-431 of the Connecticut General Statutes.

19. Section 9-431 of the Connecticut General Statutes provides, in relevant part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

20. Because Section 9-431 of the Connecticut General Statutes prohibits the plaintiff Republican Party from implementing its Rule to allow unaffiliated voters to participate in primaries in accordance with the party Rule, Republican legislators attempted to have the statute amended during the 1984 session of the Connecticut General Assembly.

21. In February, 1984, proposed legislation was introduced by State Representative Mae Schmidle in the Connecticut General Assembly which would have enabled the Republican Party to implement its Rule. Specifically, this legislation, which was assigned Raised Committee Bill No. 5525 and referred to the Committee on Government Administration and Elections,

would have amended Section 9-431 of the Connecticut General Statutes by providing, in relevant part, that:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

A copy of the complete Bill is included as Exhibit O in the Joint Submission of Facts.

22. On March 7, 1984 the Committee on Governmental Administration and Elections voted 13 to 8 against Raised Committee Bill No. 5525, thereby rejecting the proposed legislation. The Committee further voted 12 to 9 against reporting the Bill

out of Committee with an unfavorable report, thereby preventing the proposed legislation from being considered by the entire General Assembly. Thereafter, on March 15, 1984, the Committee voted to reconsider its earlier vote on the Bill and voted to send the Bill to the House of Representatives with an unfavorable report, thereby indicating to the members of the House that the Committee was opposed to the Bill, but allowing the Bill to be considered by the members of the House. However, the Bill never came before either House of the General Assembly for a Vote.

23. Albert P. Lenge, Director/Elections Attorney in the Office of the Secretary of the State of the State

of Connecticut, testified at a hearing held by the Committee on Governmental Administration and Elections on February 28, 1984 concerning the issue of implementation of the provisions of the Schmidle Bill, Raised Committee Bill No. 5525. A copy of his testimony is included as Exhibit P in the Joint Submission of Documents.

24. On April 11, 1984, the Connecticut House of Representatives defeated two amendments to House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters", each of which provided in pertinent part that:

> Where state party rules so provide, an elector whose name does not

> appear on any enrolment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative in Congress or state senator or state representative.

One Amendment, which was assigned letter "B", was defeated by a vote of 92 to 54, with 83 Democrats voting against the Bill and none in favor, and 9 Republicans voting against the Bill and 54 in favor. The second amendment, which was assigned letter "F", was defeated by a vote of 93 to 54, with 85 Democrats voting against the Bill and none in favor, and 8 Republicans voting against the Bill and 54 in favor. The complete amendments are included as Exhibits Q and R, respectively, in the Joint Submission of Documents.

25. At the time of the vote, there were 87 Democrats and Republicans in the Connecticut House of Representatives.

26. On April 19, 1984, the Connecticut Senate voted 23 to 13 against Senate Amendment Schedule "A" to Substitute House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters", which incorporated the provisions of the Schmidle Bill, Raised Committee Bill No. 5525, thereby defeating the proposal to allow the Republican Party to implement its Rule. Twenty-three Democrats voted against the Amendment and none voted in favor. No Republicans voted against the Amendment and thirteen voted in favor. A copy of the Amendment is included as Exhibit S in the Joint Submission of Documents.

27. At the time of the vote, there were 23 Democrats and 13 Republicans in the Connecticut Senate.

28. The Republican Party and Democratic Party of Connecticut are the only "major" political parties, as defined in Section 9-372(5) of the Connecticut General Statutes, in Connecticut.

29. Neither House of the Connecticut General Assembly voted on any other legislation which would have enabled the Republican Party to implement its Rule during the remainder of the 1984 session of the General Assembly, which adjourned on May 9, 1984.

30. Plaintiffs Stewart B. McKinney and Nancy L. Johnson are registered members of the Republican Party and are

United States Representatives from the State of Connecticut. Both Congressman McKinney and Congresswoman Johnson will seek reelection at the November 1984 general election and, as such, are seeking the endorsement of their respective Republican Party Congressional District Conventions for renomination to their offices.

31. Pursuant to Section 9-423 of the Connecticut General Statutes, any primaries for party nominations for the office of United States Representative would be scheduled for September 11, 1984.

32. Although the Republican Party Rule would allow the participation of unaffiliated voters in a primary for

United States Representative, Section 9-431 of the Connecticut General Statutes would not.

33. In the event that primaries are qualified for and held for Republican Congressional nominations in either the Fourth and/or Sixth Congressional Districts, and in the event that Congressman McKinney and/or Congresswoman Johnson are candidates in such primaries, Section 9-431 would prevent Congressman McKinney and/or Congresswoman Johnson from seeking nomination in primaries in which unaffiliated voters may vote pursuant to the Republican Party Rule.

34. Plaintiffs would offer evidence that for Congressman McKinney, Congresswoman Johnson and other candidates

for the Republican nominations for United States Representatives to properly plan and conduct their campaigns for nomination and re-election to office they must know whether the Republican Party will be allowed to implement its Rule providing for unaffiliated voters to participate in these primaries. Defendants stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

35. The defendant Secretary of the State has administered the provisions of Section 9-431 of the Connecticut General Statutes in the past and will continue to do so in the future.

36. In 1955 the Connecticut General Assembly enacted a "challenge" primary

law, now codified as Section 9-372 et seq. of the Connecticut General Statutes.

37. Under this primary law, party endorsements for state and district offices (offices which encompass two or more towns or parts thereof) occur at a party convention. Conn. Gen. Stat. § § 9-372(3), 9-382.

38. Delegates to conventions are endorsed in the municipalities and are subject to primary. Conn. Gen. Stat. § § 9-390, 9-407. Only enrolled party members may vote in these primaries.

39. Should an unsuccessful candidate for endorsement for state or district office receive on any roll call convention vote at least twenty percent of the number of the votes of the convention

delegates present and voting, he becomes eligible to file as a challenge candidate in a primary against the party endorsed candidate. Conn. Gen. Stat. § 9-400. If no unsuccessful candidate for endorsement receives the requisite twenty percent or if such a candidate does receive twenty percent but declines to file for a primary, no primary is held and the convention endorsed candidate becomes the party nominee.

40. Such party primaries, if necessary, are held at the expense of the State and the political subdivisions thereof.

41. Section 9-431 of the Connecticut General Statutes provides that only those on the last completed political party

enrollment list are eligible to vote in such primaries.

42. The only office on the primary ballot to which the Republican Party Rule would apply in 1984 is for United States Representative.

43. In case of any such primary in 1984, there may also be primaries for state senator, state representative, and registrar of voters occurring at the same time.

44. Under the Republican Party Rule, unaffiliated voters would not be permitted to vote in primaries for state senator, state representative, or registrar of voters.

45. The party primaries for all major political parties in the State of

Connecticut, including the Democratic and Republican Parties, are held on the same day, during the same hours and at the same polling places. Under present law and procedure, separate voting machines are used for each party on primary day.

46. It is possible that there will be on the same ballot Republican Party primaries for offices (e.g., Congress) for which unaffiliated voters may vote under the Rule, together with offices (e.g., state senator, state representative) for which they may not vote.

In such instances, special procedures will be necessary, as a practical matter, if the Republican Party Rule becomes effective. These procedures will, among other things, require that separate

and distinct ballot labels be provided for unaffiliated electors either on the same or separate and additional voting machines. In addition, election officials, including voting machine mechanics and voting machine tenders, will require special training.

47. Furthermore, unaffiliated voters will have to be separated from enrolled members of other major political parties, including the Democratic Party, because they will not be permitted to vote on any Democratic ballot.

48. In all towns where primaries are held for offices for which unaffiliateds may participate under the party Rule, additional officials, as well as additional voting machines may, in many cases, be necessary to accomodate these voters.

49. Present state law does not make any provisions, including procedural ones, for such unaffiliated voting, e.g., separate ballot labels or separate machines, number of machines, position of offices on ballots, and voter check lists.

50. Where primaries are held for offices for which unaffiliated electors may vote under the party Rule, together with those offices for which they may not vote, special "unaffiliated" absentee ballots will be required if the Rule becomes effective. See Conn. Gen. Stat. § § 9-133e, 9-135a.

51. No provision is made under State law for such unaffiliated absentee ballots. Authorized primary absentee

ballots are designed by the Secretary of State and printed and paid for by the town.

52. If the Rule becomes effective, defendant will offer testimony that there will be a question as to which ballot the town clerk should send to an unaffiliated voter who requests one for a Republican primary. This question will be due to uncertainty as to what that voter's status will be on primary day. See Conn. Gen. Stat. § § 9-133d, 9-140. Plaintiffs stipulate that, subject to the right to raise objections as reserved on page one, this evidence is admissible.

53. Sections 9-54 and 9-55 of the Connecticut General Statutes require political party enrollment lists to be

maintained. State law makes no provisions for lists of unaffiliated electors to be available at the polls on the primary day. The party rule is silent regarding development of such unaffiliated lists.

54. Connecticut Public Act 84-118 has been signed by the Governor and becomes effective on January 1, 1985. It provides that party enrollment may occur up until the day before a primary.

55. To become affiliated with a political party, an unaffiliated voter need only sign an application for enrollment form and present it to the local Registrar of Voters.

56. The State Register and Manuals may be utilized as competent and

authentic evidence of voting and registration statistics for the purposes of this case.

57. The Democratic Party of the State of Connecticut, which is the only other major political party in Connecticut at this time within the meaning of Section 9-372, does not have a rule which is in conflict with Section 9-431 or any other similar provision concerning voter eligibility in party primaries. Unaffiliated voters cannot vote in Democratic Party primaries.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT; LOWELL P. WEICKER, JR.; STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.	:	
	:	CIVIL NO. H
V.	:	84-548
JULIA H. TASHJIAN, Secretary of State of the State of Connecticut	:	

RULING ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed a motion for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., on June 13, 1984, and defendant filed a motion to dismiss, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on June 15, 1984. The court heard oral argument

on both motions at a hearing held July 5, 1984.

It is well-established that if materials outside the pleadings are presented on a motion to dismiss under Rule 12(b)(6), and the court receives those materials in the exercise of its discretion, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56. Rule 12(b), Fed. R. Civ. P.; 2A Moore's Federal Practice ¶ 12.09 (2d ed. 1984); see Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1086 (2d Cir. 1982); Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

Defendant relies on the Joint Statement of Facts (filed June 6, 1984) and

Joint Submission of Documents (filed June 6, 1984), as well as a variety of other materials outside the pleadings -- for example, the transcript of a public hearing before the 1984 Connecticut General Assembly Government Administration and Election Joint Standing Committee, see Memorandum in Support of Motion to Dismiss (filed June 21, 1984) at 33-34. Accordingly, the court will treat defendant's motion as one for summary judgment.

A case is appropriate for summary judgment only if there is no "genuine issue as to any material fact" and the moving party is "entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; See Schering Corp. v. Home

Insurance Co., 712 F.2d 4, 9 (2d Cir. 1983); Schwabenbauer v. Board of Education, 667 F.2d 305, 313 (2d Cir. 1981). Moreover, there can be no controversy as to the inferences to be drawn from the facts in evidence. Schwabenbauer, supra, 667 F.2d at 313; see Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245, 249 (4th Cir. 1967).

In this action, the parties have been unable to stipulate to the absence of disputed facts. Defendant does not concede that a subcommittee of the Republican State Central Committee concluded that the party would

> increase its chances of winning general elections; nominate candidates with greater bipartisan support; increase the involvement of

> unaffiliated voters in the electoral process in general; and strengthen the two party system by allowing unaffiliated voters to participate in Republican Party primaries.

Joint Statement of Facts, supra, ¶ 11.

Defendant also disputes that

> for Congressman McKinney, Congresswoman Johnson and other candidates for the Republican nominations for United States Representative to properly plan their campaigns for nomination and re-election to office they must know whether the Republican Party will be allowed to implement its Rule providing for unaffiliated voters to participate in these primaries.

Id. ¶ 34. Plaintiffs contest defendant's assertion that

> if the Rule becomes effective . . . there will be a question at to what ballot the town clerk should send to an unaffiliated voter who requests one for a Republican primary.

Id. ¶ 52.

The court is not persuaded that it can, at this stage of the lawsuit and in the circumstances presented, enter judgment for either side. Accordingly, the motions for summary judgment are hereby denied. Before the court is able definitively to consider the merits of the issues presented, a trial must be held to resolve these disputed issues of fact. In determining the advisability, if not necessity, of proceeding to trial, the court intimates no view on the merits of the arguments of either party to this lawsuit.

The court is mindful of the need to consider these matters expeditiously, in

light of the possibility that primaries for nominations subject to the Republican Party rule in question may be held on September 11, 1984. Accordingly, the court has established a schedule for expedited pretrial discovery on the only issues arguably in dispute. An evidentiary hearing shall be held on July 25, 1984 at 10:00 A.M. Counsel for each side are directed to submit proposed findings of fact with respect to the issues noted by no later than August 1, 1984.

It is so ordered.

Dated at Hartford, Connecticut, this 6th day of July, 1984.

/s/ Jose A. Cabranes
Jose A. Cabranes
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.	CIVIL ACTION NO.
PLAINTIFFS,	H-84-
v.	
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut	548 (JAC)
DEFENDANT.	JULY 24, 1984

SUPPLEMENTAL JOINT STATEMENT OF FACTS

The plaintiffs, through counsel, and the defendant, through counsel, hereby stipulate and agree that paragraphs 11, 34 and 52 contained in their Joint

Statement of Facts, filed June 6, 1984, may be withdrawn.

In addition, the parties hereby supplement their Joint Statement of Facts by submitting the following facts as to which they agree there are no genuine issues to be tried:

10a. The resolution passed by the State Central Committee at the August 23, 1983 meeting provided as follows:

> Be it resolved that the Republican State Central Committee empower Chairman Thomas J. D'Amore with the ability to appoint a fifteen (15) member by-laws revision committee consisting of representatives of the Republican State Central Committee, representatives from various town committees, and representatives from the category of elected officials, both past and present.
>
> Such committee to be chaired by an appointment of Chairman D'Amore from the membership of said committee.

The committee will convene as quickly as possible upon the call of its' chairman to deliberate the amending of the by-laws of the Connecticut Republican State Committee to allow unaffiliated voters the right to participate in Republican Party activities, such as primaries, to allow for a revision of our present convention system structure, and any other by-laws revisions deemed necessary. Said revisions would then be acted upon at a special state convention called for that express purpose.

Said committee shall report back to Chairman D'Amore with its' findings and recommendations so that a report can be made to the State Central Committee meeting of September 1983.

This resolution was approved by a voice vote of the members present at the meeting following the rejection, by a voice vote, of a proposed amendment which would have given the subcommittee until October 1983 (instead of September 1983)

to submit its' findings and recommendations.

11. The subcommittee appointed by Chairman D'Amore pursuant to the State Central Committee resolution met three times in September 1983.

By a vote of 11 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to provide for the revision of the party rules to permit unaffiliated voters to vote in Republican primaries; and that the State Central Committee explore such other changes in the law, or action through the courts, as the State Central Committee shall deem appropriate to accomplish this purpose.

In addition, by a vote of 12 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to consider the selection of Republican candidtates for office by direct primary instead of convention; and to explore other such changes in the law, or action through the courts as the State Central Committee shall authorize to accomplish this purpose.

11a. The Republican State Central Committee, at its September 29, 1983 meeting, by a vote of 52 in favor and 7 against, approved a action providing that it:

receive [the] report of the

> [subcommittee], with thanks, and that [it] request the State Chairman to call a State Convention before February 15, 1984 for the purpose of considering the recommended changes to the by-laws, plus any other changes that may be deemed necessary.

The member of the State Central Committee making this motion had originally utilized the word "accept" instead of "receive". However, he voluntarily modified his original motion after discussion so that the motion, as approved, provided as stated above.

* * * * * *

52. If the Rule becomes effective, there will be a question as to what ballot the town clerk should send to an unaffiliated voter who requests one for a

Republican primary. This question will be due to uncertainty as to what that voter's status will be on primary day. See Conn. Gen. Stat. §§ 9-133d, 9-140.

The parties hereby reserve all objections which they may have as to the relevance, materiality or probative value of any fact contained herein.

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, ET AL.,	:	
Plaintiffs,	:	CIVIL ACTION
vs.	:	NO. H 84-548
JULIA H. TASHJIAN, SECRETARY OF THE STATE OF THE STATE OF CONNECTICUT,	:	JULY 10, 1984
Defendant.	:	

ANSWERS TO INTERROGATORIES

QUESTION 1. Indicate the name and address of all persons who may testify that if the Rule becomes effective there will be a question as to what ballot the town clerk should send to an unqualified voter who requests a ballot for a Republican primary, as referred to in paragraph 52 of the Joint Statement of Facts.

ANSWER 1. Attorney Albert P. Lenge, Elections Attorney, and/or Attorney Deborah Dickson Shapiro, Assistant Elections Attorney, both of the Office of the Secretary of the State, Election Divison, 30 Trinity Street, Hartford, Connecticut 06106. Defendant, in lieu of or in addition to testimony, also reserves the right to request the court to take judicial notice of the existing statutory procedure and the difficulties that would result if the plaintiffs' "rule" were enforced.

QUESTION 2. State the precise manner in which it is anticipated that town clerks will respond to requests from unaffiliated voters for an absentee

ballot for a primary for either party pursuant to Connecticut Public Act 84-118, including, but not limited to, the type of ballot to be sent to unaffiliated voters.

ANSWER 2. It is anticipated that, pursuant to §§ 9-133a through 9-133e and § 9-140, none of which were amended by Public Act 84-118, town clerks will, beginning on the 19th day before a primary, issue absentee ballots upon application properly made, such ballots to be issued either by first class mail addressed to the applicant, or in person at the town clerk's office to the applicant or (where applicable under §§ 9-140 and 9-146 as amended by Public Act 84-319) to the

applicant's designee. It is anticipated that an unaffiliated voter applying for a Democratic primary absentee ballot, as is indicated on the application form provided for in § 9-140, would be issued such a ballot listing all offices being contested at such primary in such voter's voting district. This is currently the proper practice as unaffiliated voters may enroll up to and including the 14th day before the primary and ballots are available beginning the 19th day. In addition, persons who are not yet electors, may become electors and enroll up to and including the day before the primary due to the "matured rights" provision of § 9-23a and to the fact that cross-town applicants under § 9-19e may

vote in the primary if application is made by the 14th day even though it is approved by the town of residence after such 14th day. If plaintiffs' "rule" is required to be enforced, it is anticipated that an unaffiliated voter applying for a Republican primary absentee ballot would be issued either (a) such a ballot listing only those offices being contested at the primary in such voter's voting district for which such voter is eligible to vote under the Rule, or (b) more likely, such a ballot listing all offices being contested at such primary in such voter's voting district notwithstanding such voter's restricted eligibility to vote under the Rule. Public Act 84-118 does not alter the absentee ballot

issuance procedure; but if the Rule is upheld, said Act will have the effect of expanding (through the day before the primary) the period of time during which an unaffiliated voter who has applied for a Republican absentee ballot may subsequently obtain full eligibility, unrestricted by the Rule, to vote in Republican primaries by enrolling as a Republican.

QUESTION 3. State the precise manner in which the question of what ballot should be sent in response to a request from an unaffiliated voter for an absentee ballot for a Republican primary would differ from that for a request for an absentee ballot from an unaffiliated voter for a

primary in either party pursuant to Connecticut Public Act 84-118.

ANSWER 3. Under Public Act 84-118, absent the Rule, there is no question as to what absentee ballot should be issued to an unaffiliated voter applying for a primary absentee ballot of either party: such a voter would be issued such party's ballot applicable to his voting district; if such ballot is returned and such voter enrolls in such party by the deadline the full ballot will be counted; if the ballot is returned and the voter does not so enroll, the ballot will not be counted. (The checking of the ballot's outer envelope against the final supplementary enrollment lists will determine, prior to

counting, whether the voter has so enrolled). The question arises only under the Rule. Because the Rule does not affect eligibility to vote at Democratic primaries, the foregoing procedure would continue to apply to unaffiliated voters applying for Democratic primary ballots: the full ballot is sent, and it is subsequently either counted in full or not counted at all, depending on whether the unaffiliated voter has enrolled as a Democrat. Because the Rule does affect eligibility to vote in Republican primaries, the question arises for Republican primaries only: should an unaffiliated voter be issued a ballot listing only those offices for which he is eligible to vote at the time of application (thus

potentially disfranchising him in part, in the event he subsequently enrolls); or should he be sent a full ballot (thus potentially allowing him to vote for more offices than permitted under the Rule, in the event he does not enroll)? This is the precise manner in which the question of what ballot should be issued differs depending on the party, not under Public Act 84-118 but under the Rule. (The Act merely extends the time period during which the partially eligible unaffiliated voter may become a fully eligible Republican, if the Rule is upheld).

Most probably, the question would be resolved in favor of issuing a full Republican ballot to unaffiliated voters

applying for Republican primary absentee ballots. Such ballots, when returned sealed in their outer envelopes which show the voter's name and address, would be kept separate from ballots returned by Republicans after checking the names against the appropriate final lists of enrolled Republicans and unaffiliated voters. The Republican voters' ballots and the unaffiliated voters' ballots would then be opened and counted separately on primary day, in two separate and distinct procedures at each of the statutory counting times. All votes on the Republicans' ballots would be counted, but on the unaffiliated ballots only votes for offices permitted under the Rule would be counted. It should be

noted that this procedure is contrary to statute (as is the alternative of issuing different versions of the ballot for Republicans and for unaffiliated voters); would require extreme care in its implementation; would probably result in considerable confusion and official error; and could have the effect of segregating the unaffiliated absentee vote totals from the Republican absentee vote totals on the tally sheets which produce the overall primary returns.

Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Attorney for Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-766

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, the Republican Party of the State of Connecticut [the "Party"] and four of its members, move pursuant to Rule 16 of the Revised Rules of this Court to dismiss the appeal from the decision of the Court of Appeals below or, in the alternative, to affirm the decision of the Court of Appeals, on the ground that this case presents no substantial question not previously decided by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 765 (1985), and has been submitted by appellants at App. 1-141. The final opinion of the District Court is reported at 599 F. Supp. 228 (1984). A substantially similar earlier version of the District Court opinion has been submitted by appellants at App. 142-212.

QUESTIONS PRESENTED

1. Is appellate review warranted of the holding of the Court of Appeals that appellees' decision to open and expand the membership of their political party is constitutionally protected by First and Fourteenth Amendment freedoms of political association?

2. Is appellate review warranted of the holding of the Court of Appeals that a state statute that substantially intrudes on a political party's constitutional rights of association may only be upheld if narrowly drawn and justified by compelling state interests?

3. Is appellate review warranted of the determinations by the District Court and Court of Appeals that appellant did not, on the facts of this case, prove the existence of compelling state interests or of a narrowly tailored state intrusion, as necessary to sustain the state statute at issue?

4. Is appellate review warranted of the holding of the Court of Appeals that Article 1, § 2 and the Seventeenth Amendment do not preclude the party rule at issue in this case?

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the decisions below enjoining the enforcement of a Connecticut statute which, as "applied to the [appellee] Republican Party rule permitting unaffiliated voters to participate in certain Republican primaries . . . abridges the right of association guaranteed by the First Amendment." *Republican Party of State of Connecticut* v. *Tashjian*, 599 F. Supp. at 1241 [App. 196-97].

The Republican Party is a major political party in the State of Connecticut, consisting of individuals who associate themselves for the common advancement of political beliefs and ideas. [App. 245]. For some time, Republicans have been substantially outnumbered in Connecticut by registered Democrats and by registered but unaffiliated voters.[1] As a result, the Party has had limited success since 1958 in statewide elections for Governor, United States Senator and Representative.[2]

In January 1984, the Party formally adopted an amendment (the "Rule") to its party rules to allow unaffiliated voters in Connecticut to join enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. The Rule does not affect the statutory requirements which must be met by Republican Party

---

1 At the time this action was commenced, there were 659,268 registered Democrats, 532,723 registered but unaffiliated voters and 425,695 registered Republicans in Connecticut. [App. 244]. As of January 1985, there were 718,772 registered Democrats, 608,613 registered but unaffiliated voters and 477,749 registered Republicans. *The Hartford Courant*, Jan. 4, 1985 at A6 [App. 20-21 n. 4].

2 Since 1958, Republicans have won only 4 of 16 statewide elections for Governor and United States Senator. During the same time period, Republicans were victorious in only 25 of 84 of the elections for United States Representative. *See* State of Connecticut Register and Manual 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984).

candidates to qualify for placement on the primary ballot.[3] Specifically, the Rule provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

[App. 251-52].

This Rule is in direct conflict with Section 9-431 of the Connecticut General Statutes ("the statute"), which prohibits unaffiliated voters from voting in any party primary. The statute provides, in pertinent part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be. . . .

[App. 254].

In an attempt to avoid the conflict between the party Rule and the statute, Republican legislators introduced legislation during the 1984 and 1985 sessions of the Connecticut General Assembly to amend Section 9-431. The principal legislative proposal would have enabled the Republican Party to implement its Rule by amending the statute to provide that:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list

---

3 Pursuant to Sections 9-372 *et seq.* of the Connecticut General Statutes, a candidate must receive twenty (20%) percent of the vote cast at the party's nominating convention to qualify for placement on the ballot. Delegates to the convention are selected from and by party members only. The Rule does not affect the composition of the party nominating convention.

> of such party in the municipality or voting district, as the case may be. . . .

[App. 255-56]. This proposed legislation is similar to the laws in effect in Alabama, Alaska and South Carolina, which provide that a party shall establish the qualifications for participation in its party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code Ann. § 17-9-20.

During the course of state legislative hearings on the proposed legislation, the director of appellant's elections division testified that this proposal was administratively workable. [App. 257 Record 51-52 (Joint Submission of Documents, Exhibit P)].

The proposed legislation to allow implementation of plaintiffs' Rule was defeated in 1984 in committee and in both houses of the Connecticut legislature by the Democratic Party, which then controlled both houses. [App. 23-29, 255-61]. The legislation was passed in 1985 by the presently-Republican controlled Connecticut legislature, but Democratic Governor William A. O'Neill vetoed the bill. [App. 28-29 n. 7].

Appellees commenced this action in May 1984, after the first unsuccessful effort to enact legislation. The parties joined in filing a Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents. Appellees thereafter moved for summary judgment and appellant filed a motion to dismiss.

On December 5, 1984, the District Court granted appellees' motion for summary judgment and denied appellant's motion to dismiss. The court held that the statute imposed substantial burdens on appellees' right of association under the First and Fourteenth Amendments to the United States Constitution. The court further held that appellant had not proved the existence of any compelling state interests necessary to sustain the statute or that the statute was narrowly drawn to serve the interests asserted by the State. The court therefore enjoined

enforcement of the statute, as applied to the Republican Party Rule.

On August 8, 1985, the Court of Appeals affirmed, agreeing that the State had failed to prove any compelling interests or precise tailoring to justify the statutory infringement on appellees' First and Fourteenth amendment rights to freedom of association.

A notice of appeal to this Court was filed in the Court of Appeals on September 20, 1985, and appellant's Jurisdictional Statement was filed on November 4, 1985.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. THE LOWER COURTS PROPERLY ANALYZED AND RESOLVED THE FREEDOM OF ASSOCIATION ISSUES IN ACCORDANCE WITH WELL-ESTABLISHED FIRST AND FOURTEENTH AMENDMENT PRECEDENT.

In the principal argument on appeal, appellant [the "State"] mounts a three-pronged attack on the First Amendment analysis utilized by the lower courts in holding § 9-431 unconstitutional as applied. The State contends

> (1) that the statute does not substantially infringe on appellees' protected rights of association;
>
> (2) that the lower courts applied an erroneous standard of constitutional review—strict judicial scrutiny—to the statutory analysis; and
>
> (3) that, when viewed under a proper standard, the State's interests in the integrity of the primary election process validate the statute.

Appellees submit that, although the issues raised in this case are important, the lower courts' resolution of them is in accord with well-established First and Fourteenth Amendment precedent and does not warrant appellate review by this Court.

1. *Appellees' Rights of Association*

In enacting the Rule, the Republican Party opened its party processes to new members, attempting to expand its membership by obtaining the support and participation of a new group of voters in the Party's candidate selection process. The Rule reflects a declaration by the Party of its willingness to associate with voters previously excluded from party decisions, and to allow those new voters a voice in determining party candidates and by necessary implication, party philosophy as well. Through such association with, participation of and guidance from unaffiliated voters, the Republican Party seeks to increase its base of popular support in Connecticut and improve its chances of obtaining its ultimate goal, success in the general elections. *See Storer* v. *Brown*, 415 U.S. 724, 745 (1974).

These activities are fundamental and well-established components of a political party's freedom of association under the First and Fourteenth Amendments. It is, of course, beyond dispute that "the First Amendment protects political association as well as political expression," *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976), and that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." *Democratic Party of the United States* v. *Wisconsin*, 450 U.S. 107, 121 (1981) ("*Democratic Party*"); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973).

This Court has expressly recognized that a political party's freedom to associate "necessarily presupposes the [party's] freedom to identify the people who constitute the association." *Democratic Party*, *supra* at 122. Absent constitutionally impermissible criteria, a political party's freedom to choose its members and its requirements for participation in party affairs

remains absolute. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible." *Id.* at 123 n. 25. "[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Id.* at 123-24; *cf. Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975) (*en banc*).

A party's freedom to choose with whom and how it will associate is nowhere more fundamental than in its candidate selection process. "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Kusper* v. *Pontikes*, *supra* at 58. Individuals enjoy the right to associate with the candidate of their choice and with his supporters, whether by contributing money to or working for the candidate's campaign, or by supporting the candidate in the primary or general election. *See Buckley* v. *Valeo*, *supra*. "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party*, *supra* at 122; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

These associational rights are especially important to a minority party, as the Republican Party is in the State of Connecticut. *See* note 1, *supra*. In order to achieve electoral success, it is clear that a minority party must obtain new adherents, a process that may necessarily require attempts to join with other minority groups or individuals, producing a reformulation of ideas and programs as new coalitions are formed. A vital and diverse political process demands unrestricted freedom to attempt such associations.

The Court of Appeals correctly held that the Connecticut statute, § 9-431, precludes the Republican Party from exercising these fundamental rights. The Party's efforts to open the Party to new members and to obtain the support and participa-

tion of new voters in the candidate selection process are directly prohibited by the statute. The Party's efforts to increase the popular base for its candidates and improve its likelihood of success in the general elections are also frustrated. Most important, the political diversity of the Party's platform and programs is limited, as it is denied the electoral input of a new group in the candidate selection process and the concomitant responsiveness of its candidates to issues of concern to a more broadly-based electorate.

Appellees submit that the Court of Appeals correctly held, on the basis of well-established constitutional authority, that "Section 9-431 substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." *Republican Party* v. *Tashjian*, *supra* at 283 [App. 98].

2. *The Constitutional Standard of Review.*

State infringement upon the right of political association—like infringement upon freedom of speech—is subject to the "closest scrutiny." *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958). This Court has, thus, repeatedly held that a state statute that imposes substantial burdens on a political party's right of political association is unconstitutional unless the State demonstrates a compelling state interest and employs precisely tailored means to avoid unnecessary abridgement of associational freedoms. *Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244, 3258 (1984); *Democratic Party*, 450 U.S. at 124; *Buckley* v. *Valeo*, 424 U.S. at 25; *Cousins* v. *Wigoda*, 419 U.S. at 489; *Williams* v. *Rhodes*, 393 U.S. 23, 21 (1968); Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 124 (1984).

The standard of review applicable to § 9-431 is thus clear and was correctly identified by the Court of Appeals. [App. 77]. Appellate review of the proper standard is plainly unnecessary.

3. *The Sufficiency of the State's Interests.*

The Court of Appeals and the District Court held, on the basis of the evidence presented by the State and in the specific factual context of the Republican Party's Rule, that the State had not met its burden of demonstrating a narrowly drawn regulatior that serves compelling state interests.[4] The State may disagree with the lower courts' conclusions, but it has failed to specify any clearly erroneous factual findings that would warrant further review by this Court of the conclusions reached at the two levels below. *International Brotherhood of Teamsters* v. *United States Attorney*, 431 U.S. 324, 343 (1977); *Blau* v. *Lehman*, 368 U.S. 403, 408-09 (1962).

The courts below did not credit the "parade of horribles" proffered by the State in defense of the statute. [App. 120]. The courts found the State's claims that implementation of the rule would result in voter confusion, administrative chaos and disruption of the two party system factually without merit.

More fundamentally, however, the State has no legitimate interest in requiring the Republican Party to maintain a given party ideology or constituency. There can be no distortion of the party's philosophy from the inclusion of unaffiliated voters, where the party has specifically sought their input. The two party system is not undermined by one party's expansion of its electoral base, and even if a party adopts a self-destruc-

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4 In its Jurisdictional Statement, the State has referred to the three-judge court's decision in *Nader* v. *Schaffer*, 417 F. Supp. 837, *aff'd. mem.*, 426 U.S. 989 (1976), in support of its constitutional analysis here. *Nader*, however, presented a fundamentally different situation than the facts here: in *Nader*, the plaintiffs were unaffiliated Connecticut voters suing in an attempt to force political parties to allow them to participate in party activities from which they were excluded by party rule. The constitutional association rights of the parties were, under such circumstances, in conflict with and paramount to any association rights possessed by the unaffiliated voters. The three-judge court's analysis of the association issues thus resulted in upholding the statute and the parties' positions. In the instant case, the Republican Party is attempting to open its membership to unaffiliated voters, and the resulting constitutional analysis of the Party's association freedoms and the State's statutory interests is different.

tive course of action, the State has no right to interfere. *Democratic Party*, 450 U.S. at 123-24. Similarly, the State's concern for "raiding" is without basis where the Party has, by definition, invited the purported raiders to participate. The State's claims in support of the statute amount to an attempt—for whatever reasons—to freeze the Republican Party in a *status quo*, minority position, and were properly rejected as such by the lower courts. [*See* App. 195, 119, 123].[5]

B. NEITHER ARTICLE 1, SECTION 2, NOR THE SEVENTEENTH AMENDMENT BARS THE RULE ADOPTED BY APPELLEES

The State also contends that the Party's Rule is unconstitutional under Article 1, Section 2 and the Seventeenth Amendment to the United States Constitution because it establishes different qualifications for voting in Republican primaries for federal and state representatives. The State argues that these constitutional provisions require absolute symmetry in voter

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5 The State also asserts a constitutional authority, under Article 1, Section 4 and the Tenth Amendment, to regulate elections. The State's reliance on these constitutional provisions does not alter the applicable First Amendment analysis. Appellees recognize that a state has the right, subject to certain limitations, to regulate the manner in which an election—including a party primary—is conducted. Such regulation is permissible to prevent fraud in the election and to ensure the integrity of the process. *See, e.g., Rosario* v. *Rockefeller*, 410 U.S. 752, 761 (1973); *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972); Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 301 (1974).

However, a state's right to impose "time, place and manner" regulations is limited by first amendment and other constitutional protections. *See, e.g., Garcia* v. *San Antonio Metropolitan Transit Authority*, ___ U.S. ___, 105 S.Ct. 1005 (1985); *Rivera-Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 13 (1982) ("[a]bsent some clear constitutional limitation"); *Oregon* v. *Mitchell*, 400 U.S. 112, 125 (1970) ("within the limits of the Constitution"). A "time, place and manner" statute which infringes upon a protected first amendment right will be upheld only if it furthers a compelling state interest. *See, e.g., Democratic Party*, 450 U.S. at 124-25; *Kusper* v. *Pontikes*, 414 U.S. at 58-59.

eligibility for state and federal legislative primaries.[6] This contention—which was labeled "specious" by Judge Oakes below [App. 133]—is plainly without merit.

The "qualifications clause" in Article 1, Section 2 (and later repeated in the Seventeenth Amendment) was adopted as a compromise by the Framers to permit suffrage to be determined by reference to state law while insuring that the states could not establish stricter voting requirements for the selection of federal legislators than they had for state legislators. *See* I Story, *Commentaries on the Constitution of the United States* § 583, p. 405, §§ 583-84, pp. 405-07 (2d ed. 1851); D. Hutchinson, *The Foundations of the Constitution* 31 (1928).

The founding fathers were concerned that discrimination against federalism would lead states to exclude voters from congressional elections, thereby "render[ing] too dependent on the State Governments, that branch of Federal Government, which ought to be dependent on the people alone." *The Federalist* No. 52, at 354 (J. Madison) (J. Cooke ed. 1961); *see also The Federalist* No. 57, at 385 (J. Madison).

Thus, the Framers adopted the qualifications provision of Article 1, Section 2, allowing the states to maintain their own voter qualifications while at the same time ensuring that the states would not utilize more restrictive voter qualifications for federal representatives. *See The Federalist* No. 52, at 326, 354 (J. Madison).

Appellees' Rule is consistent with the language and intent of Article 1, Section 2. Any elector qualified to vote in a Republican Party primary for state representatives is also eligible to vote in the congressional primaries. No voter qualified in the state office primaries is excluded from the congressional pri-

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6 The qualifications clause of Article 1, Section 2 provides, as follows:

". . . the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

The Seventeenth Amendment contains similar language.

maries; to the contrary, the Rule operates to include additional voters in such primaries.

The State cites no authority for its claim that absolute symmetry of voter eligibility in state and federal office primaries is required, nor has it ever attempted to respond to the history of Article 1, Section 2.[7] As the District Court stated after reviewing the history and purpose of the qualifications provision, "neither the language nor the history of Article 1, Section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections." [App. 168].[8]

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7 The Seventeenth Amendment was also clearly intended to open the political process to more people. *See, e.g.*, H.R. Rep. No. 2, 62d Cong., 1st Sess. (1911); 47 Cong. Rec. 231 (1911) (statement of Rep. Norris) (amendment "is a step toward placing the real government in the hands of the people themselves").

8 Moreover, there is substantial question whether the "qualifications clause" even applies to voter eligibility for primaries. The state relies on *United States* v. *Classic*, 313 U.S. 299 (1941), and the White Primary Cases, *see e.g. Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944), as support for this position, but miscontrues the meaning of these cases, which establish that a political party has the right to determine its membership and candidate selection process without state interference as long as it does not engage in invidious discrimination or rely on other constitutionally impermissible criteria. *Democratic Party* v. *Wisconsin*, 450 U.S. at 123 n. 25; *see* L. Tribe, *American Constitutional Law* 787-90 (1978); Kester, *Constitutional Restrictions on Political Parties*, 60 Va. L. Rev. at 756-60; Blumstein, *Party Reform, the Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited*, 25 Vand. L. Rev. 975, 991-92 (1970).

CONCLUSION

For the foregoing reasons, Appellees' Motion to Dismiss or, in the alternative, Affirm this appeal should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-766

In The

Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Probable Jurisdiction noted Jan. 13, 1986

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RELEVANT DOCKET ENTRIES

I. UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

1984

May 10	COMPLAINT filed.
May 10	Motion for Preliminary Injunction, fld.
May 10	Application for Order to Show Cause filed and end.: "Granted. See Order to Show Cause entered today." JAC
May 10	Sheriff's return showing service filed
May 16	Scheduling Order, JAC.

June 6	Joint Statement of Facts by pltfs and defs
June 6	Joint submission of Documents filed by pltfs and defs
June 13	Pltf's Motion for Summary Judgment filed
June 13	Statement of Material Facts as to which there are no Genuine issues to be tried filed
June 13	Consent to Consolidate Hearing on Application for PJR with Trial on the Merits filed by pltfs.

June 15 Motion to Dismiss Complaint filed by defs

June 27 Objection to defendant's Motion to Dismiss filed

June 27 Objection to Pltf's Motion Summary Judgment filed by def

July 6 RULING ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT. "The Motion to Dismiss must be treated as motion for summary judgment. Accordingly, the motion for Summary Judgment are hereby DENIED." JAC---copies mailed MICRO on 7-9-84

July 5 HEARING before JAC on Def's Motion to Dismiss-DEC. RES. and Ptlf's Motion for Summary Judgment-DEC. RES.

July 13 PLAINTIFF'S Responses to def's Interrogatories filed

July 25 DEPOSITIONS Peter Gold & Thomas D'Amore J **sealed**

July 26 LETTER to JAC from Atty Twardy dated 7-17-84 re: response to def request for production. "The Clerk shall place attached materials under seal away from the remainder of the court file

available for public review until further order of this court. SO ORDERED." JAC---cc mld.

July 26 PROTECTIVE ORDER, filed and entered, JAC---copies mailed (sealed dep of D'Amore, Gold, Harper)

July 24 SUPPLEMENTAL Joint Statement of Facts filed by Pltf and Def

July 26 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT filed

July 26 STATEMENT of Material Facts as to which there are no Genuine

Issues to be Tried filed by Pltfs

August 16 OBJECTION to Motion for Summary Judgment filed by def

Dec. 5 RULING ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT. "Pltf's Motion for Summary Judgment is GRANTED, and Def's Motion to Dismiss is DENIED."
JAC---copies mailed M.12-5-84

Dec. 6 JUDGMENT filed and entered in favor of pltfs, ROWE, C.---copies mailed M. 12-6-84

Jan. 3	NOTICE OF APPEAL filed by def on final Judgment entered on 12-6-84 copies of Notice of Appeal mailed to counsel of record, Civil Management plan & forms C & D handed to def's Atty. (Fee paid), Certified copies of Notice of Appeal and Docket Entries mailed to USCA and New Haven.
Jan. 16	EDITED COPY FOR PUBLICATION OF DECEMBER 5, 1984 RULING FILED. Cabranes, J.

II. UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1985

March 4 Appellants brief received. (w/pfs)

March 4 Appellants joint appendix received. (w/pfs)

March 25 Record on appeal filed (original papers of district court)

March 25 Appellant brief filed w/ps*

March 25 Appellant joint-appendix filed w/ps*

April 3 Order granted movant Democratic Party for the State of Conn. motion for leave to file brief amicus curiae filed (Endorsed on motion filed 4/1/85)

April 3 Democratic Party for the State of Conn. amicus curiae brief filed w/ps

April 3 Order granted CONN. CIVIL LIBERTIES UNION leave to file brief Amicus Curiae filed (IRK) (endorsed on motion filed 4/2/85)

April 3	Movant CONN. CIVIL LIBERTIES UNION brief Amicus Curiae filed, pfs
April 11	Appellant Tashjian motion for expedited argument filed (w/pfs)
April 11	Order denied appellant Tashjian motion for expedited argument filed (endorsed on motion filed 4/11/85)
May 2	Appellant reply brief filed w/ps (by mail)
May 16	Case heard before Kaufman, Oakes, Cardamone, C.JJ.

August 8 Judgment affirmed by published signed opinion (IRK)

August 8 Concurring in separate opinion (JLO)

August 8 Judgment filed

August 29 Mandate Issued (opinion and judgment)

Sept. 20 Appellant JULIA H. TASHJIAN, SECRETARY OF THE STATE OF CONNECTICUT, notice of appeal to the Supreme Court of the U.S. filed.

Nov. 18 Notice of filing an appeal in Supreme Court filed (SC #85-766)

1986

Jan. 16 Certified copy of order by Supreme Court the statement of jurisdiction in this having been submitted and considered by the court, probable jurisdiction is noted. filed

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,	:	
PLAINTIFFS,	:	CIVIL ACTION NO. 84-548
V.	:	
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut,	:	
DEFENDANT.	:	MAY 10, 1984

COMPLAINT

I. INTRODUCTION

This is an action to vindicate the First and Fourteenth Amendment right of freedom of association of the plaintiff political party and its members of select candidates for public office in accordance with duly established party rules.

The individual plaintiffs are enrolled members of the plaintiff REPUBLICAN PARTY OF THE STATE OF

CONNECTICUT ("REPUBLICAN PARTY"), including candidates for office in the State of Connecticut. The plaintiffs bring this action to enjoin the enforcement of a statute administered by the defendant JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut, which prohibits the plaintiff REPUBLICAN PARTY from allowing, in accordance with the party's rules, unaffiliated voters to participate in primaries for the selection of the party's candidates for United States Senator, United States Representative, Governor and the gubernatorial underticket. The plaintiffs also seek a

declaratory judgment that the statute violates their First and Fourteenth Amendment right of association with others for the common advancement of political beliefs and ideas, to encourage voter participation in the electoral process and to promote bipartisan support of its candidates.

II. JURISDICTION

This action is brought pursuant to 42 U.S.C. §§1983 and 1988, the First and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. §§2201-2202. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1343(3) and 1343(4).

III. PARTIES

1. The plaintiff REPUBLICAN PARTY OF THE STATE OF CONNECTICUT ("REPUBLICAN PARTY") is a political party as defined and used in Title 9 of the Connecticut General Statutes, and is an association of individuals for the common advancement of political beliefs and ideas and for the election of its candidates to public office.

2. The plaintiff LOWELL P. WEICKER, JR. ("WEICKER") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff REPUBLICAN PARTY. He is a United States Senator from the State of Connecticut.

3. The plaintiff STEWART B. MCKINNEY ("MCKINNEY") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff REPUBLICAN PARTY. He is a United States Representative from the State of Connecticut and is an announced candidate for nomination by the Republican Party for re-election to the office of United States Representative in November, 1984.

4. The plaintiff NANCY L. JOHNSON ("JOHNSON") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff REPUBLICAN PARTY. She is a United States Representative from the State of Connecticut and is an

announced candidate for nomination by the Republican Party for re-election to the office of United States Representative in November, 1984.

5. The plaintiff THOMAS J. D'AMORE, JR. ("D'AMORE") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff REPUBLICAN PARTY. He is the Chairman of the Republican State Central Committee, the body designated by the Party rules to, inter alia, implement the rules of the plaintiff REPUBLICAN PARTY.

6. The defendant JULIA H. TASHJIAN ("SECRETARY OF THE STATE") is the Secretary of the State of the State of

Connecticut. Pursuant to Section 9-3 of the Connecticut General Statutes, she is the Commissioner of Elections of the State of Connecticut and, pursuant to statute, is charged with certain duties pertaining to elections and primaries in the State of Connecticut, including, inter alia, the administration and enforcement of Section 9-431 of the Connecticut General Statutes, which is the subject of this action.

IV. STATEMENT OF FACTS

7. On January 14, 1984, at a duly called, noticed and conducted state party convention, the plaintiff REPUBLICAN

PARTY approved an amendment (the "Rule") to its party rules to allow unaffiliated voters to associate, participate and join with enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule, entitled "Article IVa PRIMARIES", provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

8. In accordance with Section 9-374 of the Connecticut General Statutes, a copy of the Rules approved and adopted by the plaintiff REPUBLICAN PARTY at the state convention, together with a copy of the complete party rules incorporating such Rule, was filed with the Office of the Secretary of the State of the State of Connecticut on January 23, 1984.

9. Pursuant to Section 9-374, said Rule became effective on March 23, 1984.

10. Section 9-431 of the Connecticut General Statutes provides, in relevant part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be . . . .

11. Section 9-431 of the Connecticut General Statutes, therefore, prohibits the plaintiff REPUBLICAN PARTY from implementing its Rule to allow unaffiliated voters to participate in primaries for the selection of the party's candidates for United States Senator, United States Representative, Governor and the gubernatorial underticket.

12. Section 9-431 of the Connecticut General Statutes prohibits the plaintiffs WEICKER, MCKINNEY, JOHNSON and D'AMORE and other members of the plaintiff REPUBLICAN PARTY from selecting candidates for public office and encouraging voter participation in the manner which they have chosen according to their Rule.

13. Pursuant to Section 9-423 of the Connecticut General Statutes, primaries for party nominations for the office of United States Representative are scheduled for September 11, 1984.

14. The plaintiffs MCKINNEY and JOHNSON are seeking re-election as United

States Representatives and, as such, are seeking the nomination of the plaintiff REPUBLICAN PARTY for said office.

15. Section 9-431 of the Connecticut General Statutes prohibits the plaintiffs MCKINNEY and JOHNSON from being nominated in the manner chosen by the members of the plaintiff REPUBLICAN PARTY, including the plaintiff WEICKER who is a registered voter in the Fourth Congressional District in which the plaintiff MCKINNEY is seeking the party nomination and the plaintiff D'AMORE who is a registered voter in the Sixth Congressional District in which the plaintiff JOHNSON is seeking the party's nomination.

16. The defendant has enforced the provisions of Section 9-431 of the Connecticut General Statutes in the past and will continue to do so, thereby preventing the plaintiff REPUBLICAN PARTY and the plaintiffs WEICKER, MCKINNEY, JOHNSON and D'AMORE and other members of the plaintiff REPUBLICAN PARTY from selecting candidates for public office and encouraging voter participation in the manner which they have chosen according to the Rule, preventing the plaintiffs MCKINNEY and JOHNSON from being nominated for the office of United States Representative in the manner chosen by the plaintiff REPUBLICAN PARTY

and preventing the plaintiff D'AMORE from fulfilling his legal responsibility and duty to implement the Rule.

17. Plaintiffs WEICKER, MCKINNEY, JOHNSON, D'AMORE and REPUBLICAN PARTY will suffer irreparable harm to their First and Fourteenth Amendment right to freedom of association for the common advancement of political beliefs and ideas if subjected to the provisions of Section 9-431 of the Connecticut General Statutes.

18. Plaintiffs have no adequate remedy at law to rectify the irreparable harm they will suffer if subjected to the provisions of Section 9-431 of the Connecticut General Statutes.

V. CLAIM FOR RELIEF

1.-18. Paragraphs 1 through 18 of the Complaint are hereby incorporated as paragraphs 1 through 18 of the Claim for Relief.

19. Section 9-431 of the Connecticut General Statutes, as administered and enforced by the defendant SECRETARY OF THE STATE, violates the plaintiffs' First and Fourteenth Amendment right of association for the common advancement of political beliefs and ideas in the following respects:

a. in that it prohibits the plaintiffs from selecting candidates for public office in the manner chosen by plaintiffs in their Rule;

b. in that it interferes with the plaintiffs' choice of determining the manner in which they will select candidates for public office;

c. in that it interferes with the plaintiffs' right to encourage voter participation in the political process to enlarge support for their political party at the general election;

d. in that it interferes with the plaintiffs' choice of the manner in which they will govern their political association;

e. in that it interferes with the plaintiffs' right of determining the manner which is calculated to be the best to strengthen their political party and advance its interests;

f. in that it interferes with the plaintiffs' right to organize their political party in the manner that will make it the

most efficient political organization;

g. in that it interferes with the plaintiffs' ultimate goal of winning elections;

h. in that it interferes with the plaintiffs' freedom to associate for the advancement of political beliefs and ideas.

VI. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray the following relief:

1. that this Court assume jurisdiction of this action;

2. that the Court issue an order preliminarily enjoining enforcement of Section 9-431 of the Connecticut General Statutes insofar as it prohibits registered, unaffiliated voters from voting, together with enrolled Republicans, in primaries of the Republican Party of the State of Connecticut for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer;

3. that the Court declare said statute unconstitutional and invalid

insofar as it prohibits registered, unaffiliated voters from voting, together with enrolled Republicans, in primaries of the Republican Party of the State of Connecticut for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer;

4. that the Court permanently enjoin enforcement of said statute insofar as it prohibits the plaintiffs from implementing the Rule and the manner in which Republican party candidates are nominated;

5. that the Court award plaintiffs attorneys' fees and costs, pursuant to 42 U.S.C. §1988;

6. that the Court award such other relief as it deems appropriate.

THE PLAINTIFFS

BY /s/
STANLEY A. TWARDY, JR.
SILVER, GOLUB & SANDAK
P.O. BOX 389
184 ATLANTIC STREET
STAMFORD, CT 06904
(203) 325-4491

BY /s/
RALPH G. ELLIOT
TYLER, COOPER & ALCORN
ONE AMERICAN ROW
HARTFORD, CT 06103
(203) 522-1216

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Democratic State Central
Committee of Connectic
634 Asylum Avenue
Hartford, CT 06105

June 1, 1984

Honorable Jose A. Cabranes
United States District Judge
United States District Court
District of Connecticut
450 Main Street
Hartford, CT 06103

Dear Judge Cabranes:

The Democratic Party of the State of Connecticut does not believe it necessary to participate as amicus curiae in Republican Party of the State of Connecticut, et al, v. Julia Tashjian,

BEST AVAILABLE COPY

pending in the United States District Court for the District of Connecticut. We do not, however, waive any rights we may have to participate as amicus curiae should the case be appealed. We also ask that this letter of our position be placed in the record.

The Democratic Party of Connecticut respects the sovereign judgment made by the State of Connecticut that only enrolled party members be allowed to participate in party primaries. The Democratic Party of Connecticut maintains that a superseding party rule to the contrary would (1) severely threaten the

integrity of the electoral process; (2) gravely weaken the party system of the State and thus impede the goals of responsive and responsible government; (3) dispute the voting rights of party members at the expense of inclusion of unaffiliated voters who have explicitly and freely chosen not to participate in party affairs; and (4) almost certainly interfere with the associational rights and prerogatives of other parties not choosing to subscribe to such rules.

In addition, PA 84-18, HB 5105, signed by the Governor May 8, 1984, allows registration with a political party up to

the day before a primary, thus provising ample opportunity for voter participation.

The Party's basic position on the particular question before the Court is that the challenged statute is well within the legitimate scope of state regulation of primary elections.

Very truly yours,

/s/
JAMES M. FITZGERALD
Chairman, Democratic State
Central Committee of
Connecticut

CC: All Counsel of Record
All Invited Potential Amici

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

(Title omitted in printing)

June 5, 1984

JOINT SUBMISSION OF DOCUMENTS

The plaintiffs, through counsel, and the defendant, through counsel, hereby stipulate and agree to the genuineness of the attached documents.

The parties hereby reserve all objections which they may have as to the relevance, materiality or probative value of any document included herein.

The parties agree as to the genuineness of the following documents:

A. The Preamble to the Convention and Committee Rules of the Republican Party of the State of Connecticut;

B. August 17, 1983 letter by Attorney Stanley A. Twardy, Jr. on behalf of the plaintiff Connecticut Republican Party to the defendant Secretary of the State;

C. August 23, 1983 letter from the Office of the Secretary of the State in response to Mr. Twardy's letter;

D. The Official Call of the 1984 Connecticut Republican Party State Convention, dated October 6, 1983;

E. The Minutes of the January 14, 1984 Connecticut Republican Party State Convention ("the Convention");

F. Resolution Number 1 at the Convention (adopted as the Party Rule);

G. Resolution Number 5 at the Convention (also known as Alsop Resolution Number 2);*

H. Resolution Number 2 at the Convention;*

I. Resolution Number 4 at the Convention (also known as Alsop Resolution Number 1 -- erroneously referred to as a second Resolution Number 5 in the Convention Minutes);*

J. Resolution Number 7 at the Convention (also known as Dixon Resolution Number 1);*

K. Resolution Number 8 at the Convention (also known as Dixon Resolution Number 2);*

L. Resolution Number 9 at the Convention (also known as Poliner Resolution);*

M. Resolution Number 10 at the Convention;*

N. Resolution Number 11 at the Convention;*

O. Raised Committee Bill No. 5525 in the Connecticut General Assembly, February Session, 1984;

P. Testimony of Albert P. Lenge, Director/Elections Attorney Office of the Secretary of the

State, before the Committee on Governmental Administrations and Elections of the Connecticut General Assembly;

Q. House Amendment Schedule "B" in the Connecticut House to House Bill No. 5015, "An Act Concerning the Time Limit Enrollment of Unaffiliated Voters.";

R. House Amendment Schedule "F" to Connecticut House Bill No.5105;

S. Senate Amendment Schedule "A" in the Connecticut Senate to Substitute House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters."

* G through N omitted in printing

THE PLAINTIFFS

BY /s/
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THE DEFENDANT

BY /s/
ELLIOT F. GERSON
DANIEL R. SCHAEFER
DEPUTY ATTORNEY GENERAL
P.O. BOX 120
HARTFORD, CONNECTICUT 06106
(203) 566-4990

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT A

PREAMBLE

Among the goals of the Republican Party of Connecticut are to seek out, designate, and secure the election of, qualified candidates for public office at the Federal, State and Local levels of government. The Republican Party believes in each individual's dignity, ability to solve his or her own problems with minimal governmental interference and support, sound fiscal policies which will provide opportunity for all of our citizens.

The Republican Party of Connecticut stands, as it always has, open to all interested persons and offers to them equal opportunities of participation without regard to race, color, creed, sex of national origin.

In its stance as a statewide political organization, dedicated to governmental improvement on all levels, the Republican Party of Connecticut encourages fullest voter participation in its activities and supports the broadest possible membership registration.

To achieve the goal of governmental improvement, the Republican Party of

Connecticut solicits the ideas, the interest and the participation of all segments -- our young people, our seniors, businessmen and labor. Only by this means can the Republican Party adequately reflect the interests of all the people and work in their behalf. And to this end, the Republican Party is dedicated.

The Republican Party of Connecticut is further pledged, in the interests of fullest voter participation, to conduct its business in public. All party meetings at all levels shall be conducted after sufficient advance notice and in

such public places as to invite citizen observation.

The Republican Party's rules of operation are designed and followed to afford all members equal opportunity to take part in party affairs, to run for public or party office, and to serve as delegates to party conventions on all levels -- local, district, state or national.

The Republican Party of Connecticut believes in a fully informed membership and a fully informed citizenry; for it is only when all people completely know and understand our goals that we will be able to achieve them.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT B

Silver Golub & Sandak
The Heritage Building
184 Atlantic Street
Stamford, CT 06904

August 17, 1983

The Honorable Julia Tashjian
Secretary of the State
of the State of Connecticut
30 Trinity Street
Hartford, CT 06106

Attention: Election Division

Dear Secretary:

On behalf of the Connecticut Republican State Central Committee, I am writing to request a formal opinion from your office on the following issue.

The Republican State Central Committee wishes to call a state party convention in December 1983, pursuant to Section 9-384 of the Connecticut General Statutes. The purpose of this convention is to review and revise party rules.

However, the time-table established in Sections 9-381 et. seq. of the Connecticut General Statutes for the selection of delegates to a state convention are predicated upon a mid-year convention held during an election year. See, e.g., Conn. Gen. Stat. §9-391 (party endorsed candidates must be chosen at least forty days before the date

established for primaries); §9-424 (date for primaries for delegates to convention is first Tuesday in May).

Therefore, the Republican State Central Committee intends to reconvene the delegates chosen for the convention held in July 1982, to serve as delegates to the December 1983 convention.

In light of the foregoing, please advise us whether the Connecticut Republican State Central Committee may hold a state convention in December 1983, by reconvening the same delegates chosen for the 1982 convention, without the necessity of endorsing new delegates

and/or holding primaries for the selection of new delegates.

Your attention to this request is greatly appreciated.

Very truly yours,

/s/
Stanley A. Twardy,Jr.

SATJR/bam

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT C

Office of the Secretary
of the State
State of Connecticut
30 Trinity Street
Hartford, CT 06106

August 23, 1983

Stanley A. Twardy, Jr., Esq.
Silver, Golub & Sandak
Attorneys-at-Law
P.O. Box 389
Stamford, CT 06904

Dear Mr. Twardy:

This is in reply to your letter dated August 17 and received here August 19, 1983, in which you requested our opinion

as to "whether the Connecticut Republican State Central Committee may hold a state convention in December 1983, by reconvening the same delegates chosen for the 1982 convention, without the necessity of endorsing new delegates and/or holding primaries for the selection of new delegates." You stated that "The purpose of this convention is to review and revise party rules."

The following statutory provisions are relevant to your inquiry (emphases added):

Sec. 9-372(2): "'Convention' means a meeting of delegates of a political party held for the purpose of designating the candidate or candidates to be endorsed by

such party in a primary of such party for state or district office or for the purpose of transacting other business of such party."

Sec. 9-383: "The time and place of meeting of a state or district convention shall be fixed by the state central committee or other authority of the party holding such convention, in accordance with the rules of such party; provided each such convention held to endorse candidates for state or district office to be voted upon at a state election shall be convened not earlier than the sixty-first day and closed not later than the forty-third day preceding the day of the primary for such office."

Sec. 9-384 (in part): "Each convention shall originate by call of the chairman of the state central committee or other authority of the party holding such convention, in accordance with the rules of such party, which call shall be published, at least ninety days before such convention is to be held . . . ."

Sec. 9-393 (in part): "All . . . delegates to conventions shall be chosen as provided in sections 9-382 to 9-450, inclusive . . . ."

Sec. 9-391 (in part): "Each endorsement of a candidate to run in a primary . . . for the election of . . . delegates to conventions shall be made under the provisions of section 9-390 not earlier than the forty-second day nor later than the fortieth day preceding the day of such primary . . . ."

Sec. 9-405 (in part): "Candidacies of persons other than party-endorsed candidates . . . for election as . . . delegates to conventions shall be filed with the registrar, as provided in section 9-406, not later than four o'clock p.m. on the twenty-fifth day preceding the day of the primary of such party . . . for the election of . . . delegates to conventions . . . ."

Sec. 9-424: "The day for holding primaries for the purpose of electing delegates to state and district conventions shall be the first Tuesday in May."

It is clear that the delegate-selection system and schedule established by §§9-390, 9-391, 9-405, 9-424 and related

statutes is designed with reference to those conventions which must be held within the time period specified by §9-383: that is, conventions held to endorse candidates for state and district office in even-numbered years.

It is also clear that the proposed Republican convention described in your letter would not (and could not) be held for such purpose, but rather ". . . . for the purpose of transacting other business of such party," in the alternative language of §9-372(2). Therefore, the convention would not be restricted to the time period specifically provided for

endorsement conventions by §9-383, but may be held at a time ". . . . fixed by the state central committee or other authority of the party holding such convention, in accordance with the rules of such party" [9-383]--provided that the convention-call requirements of §9-384 are met.

It is equally clear, under §9-393, that all delegates to conventions must be selected pursuant to the primary law: that is, by local party endorsement, subject to primary petition and primary.

There is no specific statutory prohibition against the "reconvening" of

convention delegates who were so selected. There is also no specific statutory provision prescribing the method of amending the state rules of a political party.

Construing the applicable statutes together in this light, our opinion is as follows:

1. The next statutory delegate primaries will be held on May 1, 1984, following the delegate endorsement and petition periods which will be calculated based on that date. No statutory delegate-selection process can be implemented prior to that time.

2. Prior to such selection of delegates in 1984, and assuming compliance with statutory convention-call requirements and with any applicable party rules, the Republican party may recovene its state convention delegates who were chosen in 1982 in the manner provided in §§9-382 to 9-450, inclusive, provided such convention is held for the purpose of transacting business of the party other than the endorsement of candidates. Such business may include review and revision of party rules if that is appropriate under the existing rules of the party.

We hope that the foregoing will be of assistance to you, and that you will not hesitate to call upon this office whenever we may be of service.

Sincerely,

/s/
Albert P. Lenge
Director/Elections
Attorney

APL/mer

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT D

LEGAL NOTICE: OFFICIAL CALL
FOR REPUBLICAN STATE CONVENTION

Pursuant to the provisions of Section 9-384 of the General Statutes of the State of Connecticut; Section 1 of Article III of the Convention and Committee Rules of the Republican Party of the State of Connecticut; and the Resolution adopted by the Republican State Central Committee on September 29, 1983;

NOTICE is hereby given that the Republican Party of the State of Connecticut will reconvene the delegates chosen to the 1982 Republican State Convention, or their duly selected alternates, to a Republican State Convention on January 14, 1984, at the Hartford Civic Center, Assembly Hall, Hartford, Connecticut, for the following purposes:

1. To take appropriate action on any proposed changes in the Convention and Committee Rules of the Republican Party of the State of Connecticut, including, but not limited to, proposed changes to allow unaffiliated voters to vote in Republican Party candidate selection primaries and to revise the procedure for the

selection of Republican candidates for office.

2. To take appropriate action on any proposed resolutions brought before this Convention.

3. To transact such other business as may properly come before the Convention.

Dated at Hartford, Connecticut this 6th day of October, 1983.

/s/
Thomas J. D'Amore, Jr.
Chairman

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT E

On Saturday, January 14, 1984, State Chairman Thomas D'Amore called to order the 1984 Special Rules Convention of the Connecticut Republican State Party at 9:55 a.m.

Tom D'Amore introduced the Reverend A. Roger Williams, pastor of the Union Baptist Church in Hartford, to deliver the invocation.

Tom D'Amore then introduced Dominic Mazzoccoli to lead the Pledge of Allegiance.

Tom D'Amore welcomed the convention attendees and introduced National Committee members, the Congressional Delegation, former State Chairmen, Gold Key and Key Committee members and other guests.

Tom D'Amore introduced Francis Collins as the Temporary Chairman, who in turn announced the Temporary Officers. They were, Temporary Secretary, Betsee Osborn, Assistant Temporary Secretary, Margaret Albert, Temporary Clerk, Michael Koslowski, Assistant Temporary Clerk, Joan Rader, Parlimentarian, Attorney Ralph Elliott, Assistant Temporary Parlimentarians Stanley Twardy and Donald

Downes, Head Teller Carole Thiesfield, Tellers, Cathleen Cavanaugh, Kathleen Hickey, Donna Downes, Sargeant at Arms, John McGeever, Assistant Sargeant at Arms, Eugene Migliaro and Eugene Zaleta.

Temporary Chairman Collins recognized the Temporary Secretary for the purpose of reading the official call and to present the Temporary Roll, which she did.

Temporary Chairman Collins announced that the temporary roll of delegates and alternates, certified to this Convention by vote of the State Central Committee will be referred to the Committee on Credentials. Collins then designated

areas for the standing committees to meet and for them to be in recess until they have completed their business.

While the standing committees are in recess Temporary Chairman Collins announced that a number of distinguished members of the party would be making remarks concerning the business of the day. The following people spoke, National Committeeman John Alsop, National Committeewoman Mary Boatwright, Congresswoman Nancy Johnson, Congressman Stewart B. McKinney, Senator Lowell Weicker and Republican State Chairman Tom D'Amore.

By the time the speakers had finished, the standing committees were ready to report to the Convention.

Temporary Chairman Collins recognized the Honorable Maureen Baronian, Chairman of the Credentials Committee, who read the Credentials report. She announced that there were no changes and no challenges and moved that the convention adopt the permanent roll. The permanent roll was adopted by voice vote.

Temporary Chairman Collins recognized Larry Hurley, Chairman of the Permanent Organization Committee, for a report on the Permanent Organization and

the election of the Permanent Officers. Chairman Hurley asked it to be adopted to make the Temporary Officers, the Permanent Officers of the Convention. The Permanent Officers were adopted by voice vote.

Chairman Collins recognized the Honorable Lawrence Minichino, Chairman of the Rules Committee, for the purpose of presenting the Rules Governing the 1984 State Convention of the Republican Party of the State of Connecticut. Chairman Minichino read the rules and moved that they be adopted. The rules, as read, were adopted by a voice vote.

Chairman Collins then recognized the Honorable R. E. Van Norstrand, Chairman of the Resolutions Committee, for the purpose of reporting on any resolutions that have been presented to the Committee. Chairman Van Norstrand read Resolution #1, which amends the Party Rules to allow unaffiliated voters to join Republicans in voting in Party Primaries only for candidates for the office of United States Senator, United States Representative, Governor and the gubernatorial underticket. There were many speakers for and against the resolution. David Finley then moved the question and this was passed by a voice

vote. The vote was taken by a roll call vote of the towns in each Congressional District, starting with the Fifth Congressional District. The resolution, which had been reported out of committee favorably was passed with 531 yeas, 344 nays and 58 not voting. (copy of Resolution attached)

Chm. Van Norstrand then read Resolution #5, also referred to as Alsop-Resolution #2 which had been reported out of committee favorably and dealt with delegates to the National Convention. (Copy of Resolution attached) This resolution was defeated by a voice vote after several people spoke for and against it.

Chm Van Norstrand then read Resolution #13, which had been reported out of committee favorably. This resolution (copy attached) was presented not as a resolution but as a sense of the convention. The resolution stated that the Republican Party do what it can to have the party lever removed. This resolution passed the convention by a voice vote.

Chairman Van Norstrand presented Resolution #2 which had been reported unfavorably out of committee and this dealt with lowering the threshold vote from 20% to 15%. The convention voted to accept the committee's recommendation by

a standing vote, after much discussion from the floor. (Copy of resolution attached)

Chairman Van Norstrand read resolution #3 (copy attached) that dealt with unaffiliated voters being eligible to become delegates to State and Congressional Convention. This resolution had been reported unfavorably out of committee and the convention upheld the committee's recommendation.

Chairman Van Norstrand presented resolution #5 also referred to as Alsop-resolution #1, dealing with delegates to the National Convention. This resolution was reported out of

committee unfavorably and the convention unheld the committee's recommendation.

Chairman Van Norstrand presented resolution #7 also known as Dixon-resolution #1 which dealt with direct primaries. This resolution had been reported unfavorably out of committee and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand presented resolution #8 also known as Dixon-resolution #2, which dealt with candidates petitioning to be on a ballot. (copy attached) This resolution had been reported unfavorably out of committee and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand read resolution #9 permitting any registered Republican to participate in a primary for State Office with less than 5% of all registered Republicans. (copy attached) This resolution was reported unfavorably out of committee and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand read resolution #10 (copy attached) regarding amendments. This resolution was reported unfavorably out of committee and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand read resolution #11 (copy Attached) dealing

with an unaffiliated going on the party rolls for a period of 6 months from the date of the primary that they voted in. This resolution was reported unfavorably out of committee and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand read resolution #12 (copy attached) which stated that unaffiliat voters voting in a primary automatically go on the Republican rolls. The committee reported this resolution out unfavorably and the convention voted to uphold the committee's recommendation.

Chairman Van Norstrand reported that resolutions #6 and #14 were tabled in

committee and therefore were not reported.

All resolutions having been acted upon, State Chairman Tom D'Amore moved that the convention be adjourned. The convention was adjourned at 3:10 p.m.

Respectfully submitted

Betsee Osborn
Secretary

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT F

RESOLUTION # 1

Reported Out Favorably by the
Resolutions Committee on
January 5, 1984

Record of Resolutions Committee Vote:

Yeas 20

Nays 7

Abstain 4

PROPOSED CHANGES TO CONVENTION AND

COMMITTEE RULES OF THE REPUBLICAN PARTY

OF THE STATE OF CONNECTICUT

STATEMENT OF PURPOSE

This Resolution amends the Party Rules to allow unaffiliated voters to join Republicans in voting in Party Primaries only for candidates for the office of United States Senator, United States Representative, Governor and the gubernatorial underticket.

The Resolution does not affect primaries for candidates for other offices. Thus, unaffiliated voters would not be eligible to vote in primaries for the state legislature, municipal offices, town committee memberships or delegates to party conventions.

(TEXT OF RESOLUTION)

BE IT HEREBY RESOLVED, that the Convention and Committee rules of the Republican Party of the State of Connecticut are hereby amended as follows:

1. Article IVa is added as a new section as follows:

Article IVa PRIMARIES

[NEW]Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices

of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

BE IT FURTHER RESOLVED, that the Connecticut Republican State Party Chairman and the Connecticut Republican State Central Committee are authorized and directed to take all steps necessary and proper to implement the rules changes adopted by this Convention including, among possible others, seeking changes to existing state statutes now inconsistent with these rules and participating in

such court proceedings as may be appropriate to secure or promote implementation of these rules.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT O

STATE OF CONNECTICUT

Raised Committee Bill No. 5525 Page 1 of 2

Referred to Committee on
Government Administration & Elections

LCO No. 1673

Introduced by (GAE)

General Assembly,

February Session, A.D., 1984

AN ACT PERMITTING UNAFFILIATED VOTERS TO VOTE IN CERTAIN PRIMARY ELECTIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 9-431 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least one other elector qualified to vote in such primary or by such other evidence acceptable to the

moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether members of the town committee shall be

elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee in any municipality shall be elected both at large and from political subdivisions.

STATEMENT OF PURPOSE: To allow unaffiliated voters to vote in certain primaries if the party conducting the primary so provides in its rules.

[Proposed deletions are enclosed in brackets. Proposed additions are all capitalized or underlined where appropriate, except that when the entire text of a bill or resolution or a section thereof is new, it is not capitalized or underlined.]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT P

REP. SCHMIDLE: Mr. Lenge, I just have one quick question. I realize that you are the Elections Commission -- your division did not address Bill 5525, but from a technical, mechanical view point -- stand point, is what that bill attempting to do mechanically and technically possible? Can the way the statutes are set up today in the State of Connecticut, can this bill be implemented?

MR. AL LENGE: Yes. From a technical point of view I would suggest if it had some additional language such as the Secretary shall promulgate regulations which will implement this section. But the idea of it to -- is workable. Including from an election administration point of view even having unaffiliated electors vote for some but not all offices on the primary ballot. That is workable from an election administration viewpoint provided we by regulations do

such things as provide for the registrars to produce a list of unaffiliated voters to be checked off at the polls, number one. Provide for -- that if someone so checked they can't vote in the other party's primary if the other party also decides to open it up to unaffiliated voters, number two.

Number three, that the clerks shall print two versions of the absentee ballot and direct those respective versions to

members of the party or unaffiliated electors as the case may be. And number three -- and lastly, that there be two machines set up with two different ballot strips depending upon who is entering the machine. If an unaffiliated electors would enter those machines that have only the offices that they're entitled to vote for of that party and the regular rank and file of the party could vote for the broader number of voters.

But I would suggest a technical language change providing for regul -- the Secretary to implement the provisions of that section by regulation or get into adding all of the technical detail, amending 955 and 1940. It could be workable that way too. Yes.

REP. SCHMIDLE: Thank you very much. I realize there are many, many options. I just wondered -- your opinion on the workability.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT Q

STATE OF CONNECTICUT

AMENDMENT

LCO No. 2773

General Assembly

February Session, A.D., 1984

Offered by REP. VAN NORSTRAND,141th District

REP. JAEKLE, 122nd District

To Subst. House Bill. No. 5105
File No. 110 Calendar No. 0108

Entitled "AN ACT CONCERNING THE TIME LIMIT FOR ENROLMENT OF UNAFFILIATED VOTERS."

Strike out everything after the enacting clause and insert the following in lieu thereof:

"Section 1. Section 9--31 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT AS PROVIDED IN SECTION 2 OF THIS ACT, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least

one other elector qualified to vote in such primary or by such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in

each municipality shall prescribe whether members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political

subdivision: provided no town committee in any municipality shall be elected both at large and from political subdivisions.

Sec. 2. (NEW) Where state party rules so provide, an elector whose name does not appeal on any enrolment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative in Congress or state senator or state representative.

Sec. 3. This act shall take effect from its passage."

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT R

STATE OF CONNECTICUT

AMENDMENT
LCO No. 2743

General Assembly

February Session, A.D., 1984

Offered by REP. VAN NORSTRAND,141th District

REP. JAEKLE, 122nd District

To Subst. House Bill. No. 5105
File No. 110 Calendar No. 0108

Entitled "AN ACT CONCERNING THE TIME LIMIT FOR ENROLMENT OF UNAFFILIATED VOTERS."

In line 241, strike out the period and the bracket

In line 243, insert a period after the work "primary" and insert an opening bracket after the period and before the comma

After line 250, insert sections 5 and 6 as follows and renumber the remaining section accordingly:

"Sec. 5. Section 9-431 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT AS PROVIDED IN SECTION 6 OF THIS ACT, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list

of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged,as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least one other elector qualified to vote in such primary or by such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting

district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of

such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee in any municipality shall be elected both at large and from political subdivisions.

Sec. 6. (NEW) Where state party rules so provide, an elector whose name does not appeal on any enrolment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the

state, treasurer, comptroller, attorney general, senator or representative in Congress or state senator or state representative."

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EXHIBIT S

STATE OF CONNECTICUT

AMENDMENT

LCO No. 2982

General Assembly

February Session, A.D., 1984

Offered by SEN. ROBERTSON, 34th District

To Subst. House Bill. No. 5105
File No. 641 Calendar No. 0419

Entitled "AN ACT CONCERNING THE TIME LIMIT FOR ENROLMENT OF UNAFFILIATED VOTERS."

Strike out everything after the enacting clause and insert the following in lieu thereof:

"Section 1. Section 9-431 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least one other elector qualified to vote in such primary or by such other evidence acceptable to the

moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether members of the town committee shall be

elected from the municipality at large, in which case any person on the last-completed enrolment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrolment list of such party in such a political subdivision shall be eligible to vote in

a primary for the election of such committee members from such political subdivision; provided no town committee in any municipality shall be elected both at large and from political subdivisions.

Sec. 2. This act shall take effect from its passage."

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNIVERSITY OF ILLINOIS
at URBANA-CHAMPAIGN

College of Law
209 Law Building
504 East Pennsylvania Avenue
Champaign
217 333-0931
Illinois 61820

June 15, 1984

The Honorable Jose A. Cabranes
Judge, United States District Court
District of Connecticut
450 Main Street
Hartford, CT 06103

Re: Republican Party v. Tashjian
Civ. No. H 84-584

Dear Judge Cabranes:

I am honored to have been invited to participate as an amicus in the

above-captioned case. However, because I am not an institutional litigant and my personal resources are limited, I am simply unable to participate in the case as fully as I would like to.

I have read the papers sent to me by Deputy Attorney General Gerson pursuant to your court order of May 23d, 1984, and, as a Professor of Constitutional Law, I do not believe that the U.S. Constitution invalidates the state law at issue here. The state law has no extraterritorial application; it does not discriminate against any party nor does it discriminate on the basis of race,

religion, sex or poverty. I also find it quite relevant that the State has not placed any unduly high burdens on any person who wishes to become a registered party member and vote in the primary: I understand that State law allows any voter to register as a party member up until the day before a primary election.

The present state law does not restrain the Republican Party from selecting candidates with bipartisan support. See Plaintiffs' Memorandum of May 20, 1984, at 8. The qualified voters in the primary can vote for whomever they wish.

Moreover, new Rule: "Article IV a PRIMARIES" does not open up all Republican primaries; it only opens up primary elections for certain electoral offices. If a primary election for the office of U.S. Senator takes place at the same time as a Primary election for city mayor or State Senator, for example, then the burden on state election judges may well be heavy and the confusion on the voters great. And, if the Republican Party can, unilaterally, impose such burdens on state primaries, then the Democratic Party should also be able to impose its own rules contrary to state law.

The principle advocated by the plaintiff in this case seems to be that any state political party can invalidate all (or a portion) of any state law to which it objects. Even though a nonparty member could not force an open primary and invalidate the law, the political party could, if it chooses to do so. This principle does not find support in the case law.

I regret that I am unable to pursue these issues further, but I am honored to

have been invited to participate. I hope that I have been of some assistance.

Sincerely,

/s/
Ronald D. Rotunda
Professor of Law

RDR:blm

cc: Council of Record and
Invited Potential Amici

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LETTER MAILED BY SENATOR WEICKER IN THE 1982 CAMPAIGN FOR THE REPUBLICAN NOMINATION FOR UNITED STATES SENATOR.

(Exhibit I for identification to Plaintiff Thomas V. D'Amore's deposition of July 17, 1984).

UNITED STATES SENATE
WASHINGTON, D. C.

Dear Friend

I NEED YOUR HELP.

For the past 12 years, I've tried to represent you with independence and integrity. In doing so, I've rejected the extremes of philosophy and partisanship.

Now comes judgment for me - for my detractors. They're betting on short memories and old politics. I'm betting on the humanity I've fought for.

Here's how you can help.

A member of my staff contacted you a few days ago with a very important question concerning the primary fight I face September 7th.

On that day, the Republican party primary for U.S. Senate will be held. To win that primary I need your help . . . I need your vote.

Only voters registered as Republicans can vote. You and other Independents can vote if you re-register as Republicans by August 24th. To do that I ask you to visit your registrar or Town Clerk, who will have you fill out a simple form that will make the transfer official.

This primary, by law, will decide whether or not my name appears on the ballot in November. It will be a tough fight which I must win. If you will help me now, I will be able to continue my fight for all of you. PLEASE RE-REGISTER TODAY.

Thank you.

Sincerely,

/s/
Lowell P. Weicker

P.S. Please contact Peter Gold on my staff with any questions.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 17, 1984

REQUEST FOR ADMISSIONS PURSUANT TO RULE 36 FED. RULES OF CIV. PROC.

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant requests that plaintiff Weicker admit or deny the truth of the following matters on or before July 20, 1984:

1. The statements contained in the attached news report from the Hartford courant, January 18, 1982 which are marked by enclosures were made by Senator Weicker.

2. These statements were made in January, 1982.

Defendant further requests, pursuant to Rule 36, that plaintiff McKinney admit or deny the truth of all following matters of fact on or before July 20, 1984:

3. The statement contained in the attached press column under byline of Alan E. Schoenhaus in the Bridgeport Post on or about October 2, 1983, were made by plaintiff McKinney.

4. These statements were made in September or October, 1983.

5. The actions referred by plaintiff McKinney included the efforts

to permit unaffiliated voters, large numbers of whom have been the key to Weicker's major successes in the polls, to participate in Republican nominating procedures as stated in the paragraph that immediately follows the enclosed remarks.

DEFENDANT

BY: JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/
DANIEL R. SCHAEFER
Assistant Attorney General
P. O. Box 120
Hartford, CT 06106
Tel: 566-4990

(Certificate of Service and Note on Delivery omitted in printing)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

COMPLETE EXCERPTS FROM THE HARTFORD COURANT, JANUARY 18, 1982, WHICH WERE MARKED BY ENCLOSURES AND REFERRED TO IN PARAGRAPH 1 OF THE PRECEDING REQUEST FOR ADMISSIONS DATED JULY 17, 1984.

* * * *

"It wouldn't take more than 10,000 to 15,000 committed people coming into the party to neutralize the situation," Weicker said in a recent interview. "We're already on our way."

The "situation" Weicker referred to is the entry into the Senate race of Prescott S. Bush Jr., who plans to announce his candidacy for the GOP Senate nomination today.

* * * *

Weicker also says that, without some drastic restructuring of the state GOP - and an influx of non-Republican voters who like Weicker - Bush, a Greenwich insurance broker, could win the primary.

"If the party is left as it is now, we have a 50-50 shot" at winning a primary against Bush, Weicker predicted Tuesday. "But it isn't going to stay the way it is now."

* * * *

COMPLETE EXCERPTS FROM THE BRIDGEPORT POST ON OR ABOUT OCTOBER 2, 1983, WHICH WERE MARKED BY ENCLOSURES AND REFERRED TO IN THE PRECEDING REQUEST FOR ADMISSIONS DATED JULY 17, 1984, PARAGRAPH 3.

* * * *

"I think that's what Lowell has in mind...all signs point toward his preparing to run for governor," said 4th District Congressman Stewart B. McKinney, a veteran House Republican and longtime Weicker watcher.

Responding to questions in a private interview, McKinney said he is convinced that Weicker isn't merely mulling the idea of a gubernatorial bid in 1986, but is using his position as titular head of

the Republican Party to pave the way for a strong gubernatorial run. "I think he's getting tired of the Senate and of Washington and is thinking about the possibility of coming home...the idea has a certain amount of appeal," McKinney said, in interpreting some recent political moves undertaken by Weicker and Co.

* * * *

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 18, 1984

PLAINTIFF'S RESPONSES TO
DEFENDANT'S REQUEST FOR ADMISSIONS

The plaintiffs, through counsel, pursuant to Rule 36 of the Federal Rules of Civil Procedure, hereby respond to defendant's Request for Admissions as follows:

1. Admit that Senator Weicker did make the statements attributed to him in the January 18, 1982 article from the Hartford Courant.

2. Admit that these statements were made by Senator Weicker in January 1982.

3. Admit that Congressman McKinney did offer the opinions contained in the October 2, 1983 column from the Bridgeport Post.

4. Admit that these statements were made by Congressman McKinney in approximately September or October, 1983.

5. Admit that the opinion offered by Congressman McKinney was based, in

part, on the plaintiffs' attempt to include unaffiliated voters in Republican Party primaries.

THE PLAINTIFFS

BY /s/

STANLEY A. TWARDY, JR.
SILVER, GOLUB & SANDAK
P.O. BOX 389
STAMFORD, CT 06904
(203) 325-4491

RALPH G. ELLIOT
TYLER, COOPER & ALCORN
ONE AMERICAN ROW
HARTFORD, CT 06103
(203) 522-1216

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 24, 1984

MOTION TO DISMISS COMPLAINT

The defendant respectfully moves the court, pursuant to Rule 12(b), Federal Rules of Civil Procedure, as follows:

1. To dismiss the complaint because it fails to state a claim upon which relief can be granted.

2. To dismiss the complaint because the plaintiffs' "rule" violates Article I, S 2, Clause 1 of the Constitution of the United States in that

voters for Members of the United States House of Representatives in Republican primaries would lack the qualifications requisite for electors of the most numerous branch of the State legislature in those primaries.

3. To dismiss the complaint because the plaintiffs' "rule" violates the Seventeenth Amendment of the Constitution of the United States in that voters for United States Senator in Republican primaries would also lack the qualifications requisite for electors of the most numerous branch of the State legislature in those primaries.

4. To dismiss the complaint because the plaintiffs' "rule" violates Article I, § 4, Clause 1 of the Constitution of the United States in that the power to prescribe the manner of holding elections for the United States Senators and members of the House of Representatives is vested in the State Legislature, subject to Congressional alteration, and not in a political convention.

5. To dismiss the complaint because the plaintiffs' "rule" violates the Reserved Powers clause of the Tenth Amendment of the Constitution of the United States and contravenes the broad

discretion that states have in formulating election policies and in determining the qualifications for voters for state as well as federal offices, except as specifically limited by the Constitution.

6. To dismiss the complaint because the plaintiffs' "rule" would undermine the state's legitimate interest in protecting the overall integrity of the electoral process, including preserving responsible government by preserving party responsibility.

7. To dismiss the complaint for all other reasons set forth in the defendant's memoranda previously filed in support of the motion to dismiss.

WHEREFORE, defendant respectfully moves that the complaint be dismissed.

DEFENDANT

BY: JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/
ELLIOT F. GERSON
Deputy Attorney
General

/s/
DANIEL R. SCHAEFER
Assistant Attorney
General

/s/
HENRY S. COHN
Assistant Attorney
General
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Tel: 566-4990

(Certificate of Serivce omitted in printing)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 25, 1984

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, through counsel, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, move the Court to enter summary judgment for the plaintiffs declaring Section 9-431 of the Connecticut General Statutes unconstitutional as violative of plaintiffs first and fourteenth amendment right of freedom of political association.

In support of this Motion, plaintiffs rely on paragraphs 1 through 10, 12 through 33, 35, 54 and 55 of the Joint Statement of Facts filed with this Court on June 6, 1984, the Affidavit of Thomas J. D'Amore previously filed with this Court, paragraphs 10a, 11 and 11a of the Supplemental Joint Statement of Facts filed with this Court on July 24, 1984 and Exhibits A through F and O through S of the Joint Submission of Documents previously filed with this Court.

In further support of this Motion, plaintiffs rely on their Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Memorandum in

Support of Plaintiffs' Motion for Summary Judgment, Memorandum in Opposition to Defendant's Motion to Dismiss and in Further Support of Plaintiffs' Motion for Summary Judgment and Plaintiffs' Memorandum in Reply to Defendant's Supplemental Brief, previously filed with this Court.

THE PLAINTIFFS

BY /s/
STANLEY A. TWARDY, JR.
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(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 25, 1984

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES TO BE TRIED

The plaintiffs, through counsel, pursuant to Rule 9(c) of the Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, hereby submit that there are no genuine issues to be tried concerning the following material facts:

1. As of October, 1983, there are 659,268 registered Democrats, 532,723 registered but unaffiliated voters and

425,695 registered Republican voters in Connecticut.

2. The plaintiff Republican Party of the State of Connecticut ("Republican Party") is a major political party within the meaning of Sections 9-372 et seq. of the Connecticut General Statutes.

3. The Republican Party is an association of individuals for the common advancement of political beliefs and ideas and for the election of its candidates to public office.

4. The Preamble to the Convention and Committee Rules of the Republican Party of the State of Connecticut provides that:

> Among the goals of the Republican Party of Connecticut are to seek out, designate, and secure the election of, qualified candidates for public office at the Federal, State and Local Levels of government ....
>
> In its stance as a statewide political organization, dedicated to governmental improvement on all levels, the Republican Party of Connecticut encourages fullest voter participation in its activities ....

5. The plaintiff Lowell P. Weicker, Jr. ("Weicker") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is a United States Senator from the State of Connecticut.

6. The plaintiff Stewart B. McKinney ("McKinney") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is a United States Representative from the State of Connecticut and has obtained the party endorsement by the Republican Party Fourth Congressional District Convention for re-election to the office of United States Representative in November, 1984.

7. The plaintiff Nancy L. Johnson ("Johnson") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. She is a United States Representative

from the State of Connecticut and has obtained the party endorsement by the Republican Party Sixth Congressional District Convention for re-election to the office of United States Representative in November, 1984.

8. The plaintiff Thomas J. D'Amore, Jr. ("D'Amore") is a registered voter in the State of Connecticut and is enrolled as a member of the plaintiff Republican Party. He is the Chairman of the Republican State Central Committee, the body designated by the Party to, inter alia, implement the Party rules.

9. The defendant Julia H. Tashjian ("Secretary of the State") is the

Secretary of the State of the State of Connecticut. Pursuant to Sections 9-3 and 9-4 of the Connecticut General Statutes, she is the Commissioner of Elections of the State of Connecticut and, pursuant to statute, is charged with certain duties pertaining to elections and primaries in the State of Connecticut, including, inter alia, the administration of Section 9-431 of the Connecticut General Statutes.

10. Pursuant to a resolution passed by the members present at the August 23, 1983 meeting of the Republican Party's State Central Committee, a subcommittee was established to study and recommend

changes in the party's rules to improve the party's chances of winning general elections and to improve the two party system.

11. The resolution passed by the State Central Committee at the August 23, 1983 meeting provided as follows:

> Be it resolved that the Republican State Central Committee empower Chairman Thomas J. D'Amore with the ability to appoint a fifteen (15) member by-laws revision committee consisting of representatives of the Republican State Central Committee, representatives from various town committees, and representatives from the category of elected officials, both past and present.
>
> Such committee to be chaired by an appointment of Chairman D'Amore from the membership of said committee.

The committee will convene as quickly as possible upon the call of its' chairman to deliberate the amending of the by-laws of the Connecticut Republican State Committee to allow unaffiliated voters the right to participate in Republican Party activities, such as primaries, to allow for a revision of our present convention system structure, and any other by-laws revisions deemed necessary. Said revisions would then be acted upon at a special state convention called for that express purpose.

Said committee shall report back to Chairman D'Amore with its' findings and recommendations so that a report can be made to the State Central Committee meeting of September 1983.

12. The subcommittee appointed by Chairman D'Amore pursuant to the State

Central Committee resolution met three times in September 1983.

By a vote of 11 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to provide for the revision of the party rules to permit unaffiliated voters to vote in Republican primaries; and that the State Central Committee explore such other changes in the law, or action through the courts, as the State Central Committee shall deem appropriate to accomplish this purpose.

In addition, by a vote of 12 in favor to one against, the subcommittee approved the following resolution:

> RESOLVED: that it is the recommendation of the [subcommittee] that the State Central Committee instruct the Republican State Chairman to call a convention of the Republican Party in accordance with applicable provisions of the party rules and the Connecticut General Statutes to consider the selection of Republican candidates for office by direct primary instead of convention; and to explore other such changes in the law, or action through the courts as the State Central Committee shall authorize to accomplish this purpose.

13. The Republican State Central Committee, at its September 29, 1983

meeting, by a vote of 52 in favor and 7 against, approved a motion providing that it:

> receive [the] report of the [subcommittee], with thanks, and that [it] request the State Chairman to call a State Convention before February 15, 1984 for the purpose of considering the recommended changes to the by-laws, plus any other changes that may be deemed necessary.

14. Based upon the recommendations of this subcommittee, and in accordance with Section 9-384 of the Connecticut General Statutes and applicable party rules and resolutions, Republican Party Chairman D'Amore called and noticed a state party convention to consider, inter

alia, "proposed changes [in party rules] to allow unaffiliated voters to vote in Republican candidate selection primaries."

15. On January 14, 1984, at a duly called, noticed and conducted state party convention, the Republican Party approved an amendment (the "Rule") to its party rules to allow unaffiliated voters to associate, participate and join with enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule, entitled "Article IVa PRIMARIES", provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

16. The Convention was called pursuant to Section 9-384 of the Connecticut General Statutes and in accordance with the opinion of the defendant's office dated August 23, 1983. That opinion was in response to a letter on behalf of the plaintiff Republican Party to the defendant dated August 17, 1983.

17. In accordance with Section 9-374 of the Connecticut General Statutes, a copy of the Rule approved and adopted by the Republican Party at the state convention, together with a copy of the complete party rules incorporating such Rule, was filed with the Office of the Secretary of the State of the State of Connecticut on January 23, 1984.

18. Section 9-431 of the Connecticut General Statutes provides, in relevant part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

19. Because Section 9-431 of the Connecticut General Statutes prohibits the plaintiff Republican Party from implementing its Rule to allow unaffiliated voters to participate in primaries in accordance with the party Rule, Republican legislators attempted to have the statute amended during the 1984 session of the Connecticut General Assembly.

20. In February, 1984, proposed legislation was introduced by State Representative Mae Schmidle in the Connecticut General Assembly which whould have enabled the Republican Party to implement its Rule. Specifically, this

legislation, which was assigned Raised Committee Bill No. 5525 and referred to the Committee on Government Administration and Elections, would have amended Section 9-431 of the Connecticut General Statutes by providing, in relevant part, that:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be ....

21. On March 7, 1984 the Committee on Governmental Administration and Elections voted 13 to 8 against Raised Committee Bill No. 5525, thereby

rejecting the proposed legislation. The Committee further voted 12 to 9 against reporting the Bill out of Committee with an unfavorable report, thereby preventing the proposed legislation from being considered by the entire General Assembly. Thereafter, on March 15, 1984, the Committee voted to reconsider its earlier vote on the Bill and voted to send the Bill to the House of Representatives with an unfavorable report, thereby indicating to the members of the House that the Committee was opposed to the Bill, but allowing the Bill to be considered by the members of the House. However, the Bill never came

before either House of the General Assembly for a vote.

22. Albert P. Lenge, Director/Elections Attorney in the Office of the Secretary of the State of the State of Connecticut, testified at a hearing held by the Committee on Governmental Administration and Elections on February 28, 1984 concerning the issue of implementation of the provisions of the Schmidle Bill, Raised Committee Bill No. 5525. In said testimony, he indicated that the Bill was "workable" and thus was capable of being implemented.

23. On April 11, 1984, the Connecticut House of Representatives defeated two amendments to House Bill No. 5105, "An Act Concering the Time Limit for Enrollment of Unaffiliated Voters", each of which provided in pertinent part that:

> Where state party rules so provide, an elector whose name does not appear on any enrolment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative in Congress or state senator or state representative.

One Amendment, which was assigned letter

"B", was defeated by a vote of 92 to 54, with 83 Democrats voting against the Bill and none in favor, and 9 Republicans voting against the Bill and 54 in favor. The second amendment, which was assigned letter "F", was defeated by a vote of 93 to 54, with 85 Democrats voting against the Bill and none in favor, and 8 Republicans voting against the Bill and 54 in favor.

24. At the time of the vote, there were 87 Democrats and 64 Republicans in the Connecticut House of Representatives.

25. On April 19, 1984, the Connecticut Senate voted 23 to 13 against Senate Amendment Schedule "A" to

Substitute House Bill No. 5105, "An Act Concerning the Time Limit for Enrollment of Unaffiliated Voters", which incorporated the provisions of the Schmidle Bill, Raised Committee Bill No. 5525, thereby defeating the proposal to allow the Republican Party to implement its Rule. Twenty-three Democrats voted against the Amendment and none voted in favor. No Republicans voted against the Amendment and thirteen voted in favor.

26. At the time of the vote, there were 23 Democrats and 13 Republicans in the Connecticut Senate.

27. The Republican Party and Democratic Party of Connecticut are the

only "major" political parties, as defined in Section 9-372(5) of the Connecticut General Statutes, in Connecticut.

28. Neither House of the Connecticut General Assembly voted on any other legislation which would have enabled the Republican Party to implement its Rule during the remainder of the 1984 session of the General Assembly, which adjourned on May 9, 1984.

29. Plaintiffs Stewart B. McKinney and Nancy L. Johnson are registered members of the Republican Party and are United States Representatives from the State of Connecticut. Both Congressman

McKinney and Congresswoman Johnson will seek reelection at the November 1984 general election and have obtained the endorsement of their respective Republican Party Congressional District Conventions for renomination to their offices.

30. Although the Republican Party Rule would allow the participation of unaffiliated voters in a primary for United States Representative, Section 9-431 of the Connecticut General Statutes would not.

31. Section 9-431 would prevent Congressman McKinney and/or Congresswoman Johnson from seeking nomination in

primaries in which unaffiliated voters may vote pursuant to the Republican Party Rule.

32. The defendant Secretary of the State has administered the provisions of Section 9-431 of the Connecticut General Statutes in the past and will continue to do so in the future.

33. Connecticut Public Act 84-118 has been signed by the Governor and becomes effective on January 1, 1985. It provides that party enrollment may occur up until the day before a primary.

34. To become affiliated with a political party, an unaffiliated voter

need only sign an application for enrollment form and present it to the local Registrar of Voters.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

(Title omitted in printing)

AUGUST 16, 1984

OBJECTION TO MOTION FOR SUMMARY JUDGMENT

A. The defendant objects to plaintiffs' motion for summary judgment dated July 25, 1984, on the grounds that plaintiffs are not entitled to judgment as a matter of law as required by Rule 56(c), Federal Rules of Civil Procedure, for the following reasons:

1. The complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' "rule" violates Article I, § 2, Clause 1 of the

Constitution of the United States in that voters for Members of the United States House of Representatives in Republican primaries would lack the qualifications requisite for electors of the most numerous branch of the State legislature in those primaries.

3. Plaintiffs' "rule" violates the Seventeenth Amendment of the Constitution of the United States in that voters for United States Senator in Republican primaries would also lack the qualifications requisite for electors of the most numerous branch of the State legislature in those primaries.

4. Plaintiffs' "rule" violates Article I, § 4, Clause 1 of the Constitution of the United States in that the power to prescribe the manner of holding elections for United States Senators and members of the House of Representatives is vested in the State Legislature, subject to Congressional alteration, and not in a political convention.

5. Plaintiffs' "rule" violates the Reserved Powers clause of the Tenth Amendment of the Constitution of the United States and contravenes the broad discretion that states have in formulating election policies and in

determining the qualifications for voters for state as well as federal offices, except as specifically limited by the Constitution.

6. Plaintiffs' "rule" would undermine the state's legitimate interest in protecting the overall integrity of the electoral process, including preserving responsible government by preserving party responsibility.

7. The complaint is legally insufficient for all other reasons set forth in the memoranda in support of the motion to dismiss previously filed.

B. Defendant further objects to the motion for summary judgment on the

grounds that plaintiffs' "Statement of material facts as to which there are no general issues to be tried," dated July 25, 1984, is incomplete and otherwise does not reflect fairly the Joint Statement of Facts previously filed on the following grounds:

1. Plaintiffs' Statement of Material Facts omits paragraphs 36 through 53 and 56 through 57 of the Joint Statement of Facts previously filed.

2. Paragraph 13 of plaintiffs' statement of material facts does not indicate that the member of the State Central Committee making the decision had originally utilized the word "accept"

instead of "receive". However, he voluntarily modified his original motion after discussion so that the motion, as approved, provided as stated in paragraph 13. Supplemental Joint Statement of Facts dated July 24, 1984, 11a.

3. The statement of Albert P. Lenge, Elections Attorney, Office of the Secretary of the State, is quoted out of context in paragraph 22 of plaintiffs' statement of July 25, 1984. In his testimony, included in the Joint Submission of Documents dated June 5, 1984, Exhibit P, he suggested that there be additional language authorizing the Secretary to promulgate regulations to

implement the section involved. He further stated that regulations should provide for a list of unaffiliated voters to be checked off at the polls and provisions to insure that an unaffiliated voter would not vote in the other party's primary. He also stated the clerks should be required to print two versions of the absentee ballot for party members or unaffiliated electors. In addition, he stated that two machines would be required with different ballot strips depending on who was entering the machine. Finally, the bill to which he referred to, H.B. 5525, is not the same as plaintiffs' "rule" in that the letter

would apply only to one party and even then only to some, not all candidates, thus necessitating different procedures for different offices within plaintiffs' party.

C. Defendants further object to consideration of the affidavit of Thomas D'Amore Jr. on the grounds that it is superseded by the Joint Statement of Facts and Joint Submission of Documents both dated June 5, 1984, and the Supplemental Joint Statement of Facts, dated July 24, 1984, as well as the fact that certain portions are not shown to be based upon personal knowledge as required by Rule 56(e), Federal Rules of Civil

Procedure, and are disputed by discovery materials.

However, in view of the fact that plaintiffs have withdrawn reliance upon that affidavit by their letter of August 10, 1984, no further objection is made.

DEFENDANT

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(Certificate of Service omitted in printing)

Notation Where Other Items .pecified in Rule 30.1, Rules of the United States Supreme Court, Appear

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The Appendix to the Jurisdictional Statement contains the following items:

Opinion of the United States Court of Appeals for the Second Circuit, August 8, 1985, at Vol. I, pp. 1-141;

Opinion of the United States District Court for the District of Connecticut, granting injunctive relief, at Vol. II, pp. 142-213;

Judgment of the U.S. Court of Appeals, at Vol. II, pp. 214-216;

Joint Statement of Facts in U.S. District Court, June 5, 1984, at Vol. II, pp. 243-273;

U.S. District Court Ruling On Motion To Dismiss And Motion For Summary Judgment, at Vol. II, pp. 274-280;

Supplemental Joint Statement of Facts in U.S. District Court, July 24, 1984, at Vol. II, pp. 281-287;

Answers (By Defendant) to Interrogatories, July 10, 1984, at Vol. II, pp. 288-298 (remaining questions and answers deleted);

* * * *

In addition to these items, relevant constitutional and statutory provisions are contained in Vol. II, pp. 222-238 of the Appendix to the Jurisdictional Statement.

Supreme Court, U.S.
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CLERK

No. 85-766

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

Where the state creates, regulates, and with its towns finances state primaries, and also grants automatic and preferential access on the general election ballot to the primary winners,

1. Does a state statute which requires only that a person belong to a political party in order to vote in that primary violate the First Amendment of the U.S. Constitution solely because a party adopts a conflicting rule?

2. Does a party rule which provides, contrary to state law, that unaffiliated persons may vote in some, but not all, state primaries undermine

the State's responsibility to set voter qualifications and regulate elections under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments of the U.S. Constitution?

3. Does the party rule also violate Art. I, § 2, and the Seventeenth Amendment because it discriminates in voter qualifications for Congressional elections as compared to those for the State Legislature?

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In the Supreme Court of the United States
October Term, 1985

No. 85-766

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals, J.S. App. 1-141,* is reported at 770 F.2d 265 (1985). The original opinion of the District Court is at J.S. App. 142-213. An edited version is reported at 599 F.Supp. 1228 (1984).

JURISDICTION

This is an appeal from a decision of the U.S. Court of Appeals for the Second

* Hereafter, J.S. App. is used to refer to the separately bound appendices filed with the Jurisdictional Statement. J.A. refers to the Joint Appendix submitted with this brief.

Circuit holding invalid under the U.S. Constitution § 9-431, Conn. Gen. Stats., relied on by the appellant, which provides that one must belong to a political party to vote in that party's primary elections.

Federal jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). Judgment was entered Aug. 8, 1985. J.S. App. 214-16. A notice of appeal to this Court was filed in the Court of Appeals Sept. 20, 1985. J.S. App. 217-21. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

The jurisdictional statement was filed November 4, 1985. Probable jurisdiction was noted January 13, 1986.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Art. I, §§ 2 and 4, the First, Tenth and Seventeenth Amendments to the Constitution, § 9-431, Conn. Gen. Stats., and other provisions of Ch. 153, Parts I, II and III A., Conn. Gen. Stats., set forth in J.S. App. 222-38.

STATEMENT OF THE CASE

Conn. Gen. Stats. § 9-431 requires that persons be members of a political party to vote in that party's primary election. The plaintiffs, however, rely on a party rule which would, contrary to statute, allow unaffiliated voters to vote in Republican primaries for United States Senators, United States

Representatives, Governor and certain executive officers elected on a statewide basis. It would not apply to any other elected offices in the State, including the State Senate and House.

The rule is that of a state, rather than a national, party convention. It deals with state and local primaries and not presidential ones. J.S. App. 251-2.

In 1955, the Connecticut General Assembly, with bipartisan support, enacted a challenge primary law. § 9-400 Conn. Gen. Stats. That law allows a candidate who obtains 20% or more of the convention vote to wage a primary for the nomination.

The legislation involved in this case was passed after extensive debate, with the Assembly aware of the various methods for primary elections. See 6 Conn. Sen. Proc., Pt. 11, Nov. 1955 Sp. Sess., p. 542. The legislature chose the primary system that it believed would best preserve political party integrity and responsibility. Id. at pp. 458, 542.

Connecticut law provides for automatic and preferential ballot access for major parties. SS 9-379, 9-249a, Conn. Gen. Stats. The primary is financed by public funds. See, e.g., SS 9-436, 9-441, Conn. Gen. Stats. Party enrollment is accomplished simply by completion of a short form up to one day

before the primary. Conn. Gen. Stats. § 9-56; Conn. P.A. 84-118.

In 1976, the same law invalidated by the Court of Appeals was upheld in Nader v. Schaffer, 417 F.Supp. 837 (D.Conn. 1976, three- judge court), aff'd mem., 429 U.S. 989 (1976).

The District Court (D. Conn.) denied the defendant's motion to dismiss and granted summary judgment for the plaintiffs Dec. 5, 1984. J.S. App. 197. The Court of Appeals affirmed the judgment Aug. 8, 1985. J.S. App. 214-16 130-31.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals subjects state laws regarding election administration to the acquiescence or veto of a political party, notwithstanding legitimate state interests to the contrary. Under the holding and logic of that opinion, many election codes of the states -- including primary laws -- could be invalidated any time a political party adopts an inconsistent rule. The Court of Appeals itself acknowledged that this case has "far-reaching implications... for primary elections in particular and the two-party system in general...." J.S. App. 33-4 n.10.

A major flaw in the Court's opinion is that it ignores the public electoral function of major political party nominations. In reality, political parties virtually monopolize American elections. Party nominees, in turn, dominate government. The Court, however, treats those nominations as just another private affair.

The opinion of the Second Circuit conflicts with this Court's affirmance in Nader, supra, which upheld the very law that has now been struck down. The decision also improperly extends Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), which involved an attempt by a state to

regulate a national party convention. That case did not involv -- or ever question -- the authority of a state to regulate its own state-financed primary elections.[1/]

Moreover, the Court of Appeals grossly misapplies Roberts v. United States Jaycees, ____U.S.____, 104 S.Ct. 3244 (1984), to reach its remarkable conclusion that a major political party resembles an intimate human relationship.

1/ See dissent from the dismissal of appeals in Bellotti v. Connolly, et al., ____U.S.____, 103 S.Ct. 1510 (1983), (Stevens,J., joined by Rehnquist, J., and O'Connor, J.), contrasting state regulation of a nation-wide contest with state regulation of elections for state-wide office.

This unprecedented conception of political associational rights must be set aside "if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).

For example, under plaintiffs' rule voting qualifications would differ from party to party and office to office, creating unreasonable administrative burden, errors and expense, as well as voter confusion.

Furthermore, and critically, the Court employed a severe standard of review which preordains the unconstitutionality of many state election laws. The Court's opinion also

substantially narrows the voting rights protections afforded by Art. I, §§ 2 and 4, of the Constitution.

The issue in this case is not whether open or closed primaries better promote the goals of effective, responsible and democratic government in a state; that decision was made, as it must be, by Connecticut's popularly elected state officials. The issue, instead, is whether the States may continue to regulate primary elections under the Constitution, or whether those laws will now be subject to the constantly shifting sands of political conventions.

ARGUMENT

I. A State Law Regulating State Primaries Does Not Violate Associational Rights Simply Because A Political Party Adopts A Conflicting Rule.

A. Primaries Of Major Parties Are So Closely Related To The General Election That The Choice Of A Primary System Is A Very Significant One For The State.

In his classic work on American government, James Bryce stated that "[i]n "America the great moving forces are the parties." 2 J. Bryce, The American Commonwealth 5 (1924). The power of the major political parties, therefore, is of very legitimate public and State concern.

It is common knowledge that the major political parties dominate if not

monopolize the electoral process. Their nominees will usually exercise sovereign power. Primaries and nominating conventions are "closely related to the final election and their proper regulation [is] ... essential to effective regulation of the latter, so vital to representative government...." Newberry v. United States, 256 U.S. 232, 285 (1921) (Pitney, J., concurring part, joined by Brandeis, J. and Clarke, J.).

> So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible.... As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.

Id. at 286.

The Court in United States v. Classic, 313 U.S. 299 (1941), recognized that "the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election...." Id. at 319.

The Classic decision noted that the primary was conducted at public expense and largely regulated by the State. Id. at 311. This is also true in Connecticut. See ch. 153, Parts I, II and III A, Conn. Gen. Stats. The Court held that the primary was really a step in the overall election process under Art. I, S 2, "[w]here the state law has

made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice...." Id. at 318 (emphasis added).

This was true whether or not the primary determined the election outcome and regardless of whether racial discrimination was present. Id. at 323. Furthermore, voter qualifications were to be determined by state law subject to Art. I, SS 2 and 4, and the States in passing those laws exercised "wide discretion". Id. at 310, 311.

Subsequently, in Smith v. Allwright, 321 U.S. 649, 660 (1944), the Court noted that although primary elections were conducted by the party, this was done

under state statutory authority. Id. at 663.

> The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.

Id.

The State, by placing the primary winners on its official election ballot, enforced the party practice. The Court concluded:

> The privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.

Id. at 664-665. (emphasis added) 2/

2/ "[T]he state delegates to the political party the decidedly

(footnote cont'd)

See also Storer v. Brown, 417 U.S. 724, 735 (1974); Lubin v. Pannish, 415 U.S. 709, 715 (1974).

Furthermore, the Second Circuit itself has ruled that a party's

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> governmental function of determining who may gain a place on the ballot ... it thus seems clear that the actions of a political party integrally involved in the selection of a candidate for public office should be treated as state action where the state incorporates the party's choice by conferring some political benefit, such as preferential ballot access, upon the candidate." L. Tribe, American Constitutional Law, § 13-23, p. 790. "This delegation and adoption by the state provides the proper basis for finding state involvement in party procedures...." Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1160 (1975).

nomination for government office is a "public electoral function" and not a private affair.[3/]

The three-judge court in Nader v. Schaffer, supra 417 F. Sup. 837, which upheld the same law that was struck down in this case, recognized that because of the electoral success of the two major parties, their nominations are "so important to the ultimate selection of government leaders." Id. at 843. These nominations are regulated in detail

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3/ Seergy v. Kings County Republican County Committee, 459 F.2d 308, 313-15 (2d Cir. 1972); see also Montano v. Lefkowitz, 575 F.2d 378, 383-84 n. 7 (2d Cir. 1978); Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 894 (2d Cir. 1980).

because "the State is particularly concerned with the parties which have demonstrated some probability of success in the general election and whose candidates may become holders of public office." Id. When the usefulness of the party is seriously impaired, "[i]n the end, the chief loser would be the public." Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1973), aff'd, 410 U.S. 752 (1973). See also V.O. Key, Politics, Parties and Pressure Groups 9, 283 (5th 1964); W. Wilson, Constitutional Government In The United States 204-07 (1908); J. Burns, The Power To Lead, 214 (1984).

"The party struggle itself is concerned with the direction of public affairs. Party nominations are no more than a means to this end." Toward A More Responsible Two-Party System, 44 Am. Pol. Sci. Rev. (Supp.) 15 (1950). As one of the authors of the law involved in this case stated, "the ultimate significance of a state's party system lies in the effect it has on the making of public policy...." D. Lockard, New England State Politics 320 (1959).

In a strong two-party system, the voters may be offered a choice between party labels, each backed by a platform and record. Key, supra, at 298. When that system deteriorates, so does that choice. Id.

In fact, "[t]he internal structures of the parties within a state can have the most far-reaching implications for the kind of policy orientation of the state government...." Lockard, supra, at 324.[4/]

It follows, therefore, that the nominating process of the major parties

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4/ That study analyzed the consequences of party competition and structure on state policy in New England. The states with a healthy two-party system and effective party leadership had a more equitable tax system, better social services, stronger workmen's and unemployment compensation laws and more advanced anti-discrimination measures than did the others. Id. at 327-33. This was attributed to the pressure of state-wide elections and the need for the party to run on its legislative record. Id. at 333-334.

to the extent that it may affect party performance and responsibility is of legitimate, if not compelling, public interest. See Key, supra, at 386-95. As Bryce stated, the details of party nomination "have more significance and make more difference to the working of the government than many of the provisions of the Constitution itself." 2 Bryce, The American Commonwealth 89 (1924).

B. Each State May Choose The Primary System Including Voter Qualifications Which It Believes Will Best Further The Purposes Of Representative Government.

A State in providing for voter qualifications in primaries is "sovereign over matters not ruled by the

Constitution." Rodriquez v. Popular Democratic Party, supra, 457 U.S. 1, 8 (1982) (involving laws for filling legislative vacancies). In the absence of a clear constitutional limitation, a State "is free to structure its political system to meet its 'special concerns and political circumstances.'" Id. at 13-14. The state's electoral system is entitled to "substantial deference." Id.

When this Court upheld the Connecticut redistricting plan, it emphasized that the 14th Amendment does not require "repeated displacement of otherwise appropriate state decision making" simply to promote perfectly equal districts. Gaffney v. Cummings, 412 U.S.

735, 749 (1973). Respect must be given to "the essentially political processes of the sovereign States." Id. at 754. The plan's validity did not depend upon the consent of all political parties.[5/]

The State has comprehensive election authority which extends to primaries and voter registration and qualifications. Storer v. Brown, 415 U.S. 724, 730 (1974). "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases...." Id. at 730.

5/ In fact, the Democratic Party had opposed the plan.

Furthermore, "'[i]n facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations....'" Nader v. Schaffer, supra, 417 F. Supp. at 845-46, quoting Ray v. Blair, 343 U.S. 214, 226 n. 14 (1952). "Each state legislature chooses the primary scheme that it thinks will best promote democratic, electoral and governmental goals." Nader, supra, at 843. While the State's choice of a primary system is not immune from judicial review, that review should not constitute "'some amorphous general supervision of the operations of government." Id. at 850, quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

A State should not be denied its choice of a primary system simply because it may not be able to please all political factions. The fundamental concern in election law is not the interest of the candidate "but rather, the interests of the voters who choose to associate together to express their support." Anderson v. Celebreeze, ____U.S. ____, 103 S. Ct. 1564, 1579 (1983). That is why primaries were provided for in the first place, to remove politics from the domination by a few. See, e.g., C. Merriam and L. Overacker, Primary Elections 5-11 (1928).

Charles Evans Hughes, when he served as President of the National Municipal

League, argued that "[t]he question then of primaries is essentially a State question. It will be solved in each State in the light of the traditions and experience of that State...." C.E. Hughes, The Fate Of The Direct Primary, 10 Nat. Mun. Rev. 23, 30-31 (1921).

C. Connecticut Has Selected The Type of Primary Which It Believes Will Best Encourage Party Responsibility and Viability.

When the three-judge court in 1976 unanimously upheld the same law involved in this case, it did not do so simply because political parties supported the statute. It recognized a legitimate State interest wholly distinct from that of the party:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 Rutgers L.Rev. 298 (1974), and Comment, 40 U.Chi.L.Rev. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); and American Party of Texas v. White, 415 U.S. 7678, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

Nader v. Schaffer, supra, 417 F.Supp. at 845.

In sustaining the requirement of 20% of the convention vote for a primary, another three-judge concluded that "[t]he state... [has] an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." [citing the legislative history of the Connecticut primary law]. Tansley v. Grasso, 315 F.Supp. 513, 517 (D. Conn. 1970). (Clarie, J.)

When the Connecticut primary law was passed in 1955, Senator Lockard, co-chairman of the committee which reported the bill--and a professor of government and author of the political studies previously discussed--stated:

> By nature it is primarily a primary which retains the importance of the political party. We came to the decision that we could have and should have, not a wide open direct primary but rather a primary that preserved the integrity of the political party as an important function of the Govenment process as we know it in this country.

6 Conn. Sen. Proc., Pt. 11, Nov. 1955 Sp. Sess., p. 542.

One of the supporters of the law in the House, Rep. Cunningham, a Republican, noted that the bill reflected a very deliberate choice:

> Connecticut is my favorite State for a great many reasons, one of them being that it is such a fascinating combination of conservatism and progressiveness.... So it is not surprising to find Connecticut the last state in the union to adopt a primary law. As a matter of fact, this delay had certain advantages because it enabled us to benefit by the experience of the other states

> with their various types of such laws and select the type most suitable to the conditions peculiar to us.

6 Conn. House Proc., Pt. 8, Nov. 1955 Sp. Sess., pp. 457-58.

The primary law would involve rank and file voters in selecting candidates and determining policy while "at the same time maintaining party responsibility." Id. at 458. Rep. Cunningham continued: "And if you believe, as I do, that one very important factor in the success of our particular experiment in Democracy is due to the fact it functions through a strong two-party system, you will admit the necessity of party responsibility." Id.

The House Republican Majority Leader, Rep. Parsells, supporting an earlier version of that bill in a prior session, also stressed that "this type of primary recognizes party responsibility and it doesn't do away with our political parties, but it builds up their strength." 6 Conn. House Proc., Pt. 6, 1955 Reg. Sess., p. 3136. Rep. Parsells also noted:

> Thirty-four states use this type of closed-party primary; four states, including our neighboring State of Rhode Island use this type of post-convention primary. It is recommended by the National Municipal League as the most forward-looking and advanced type of primary. It was proposed by Charles Evans Hughes in 1911 and it has been adopted in various states since that time.

Id. at 3136-37.

The importance of preserving party effectiveness and responsibility was also emphasized by legislators of both parties in the 1984 General Assembly which declined to amend § 9-431, the law invalidated below. [6/] At the legislative hearings, Rep. Cibes, a professor of political science, stated:

> [T]he public at large does have an interest in maintaining strong party organizations with coherent policies clearly competitive with each other. And permitting unaffiliated voters to vote not to mention the other horrible things that could happen if state party rules would so provide, permitting unaffiliated voters to vote in party primaries provides a possible end run around the party faithful. It weakens parties and it

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6/ Excepts from the hearings and floor debates are set forth in the Addendum [hereafter Leg. Add.] in more detail.

> weakens party competition. And I don't think the public at large would be well served by the passage of 5525.

Joint Committee, Government Administration And Elections, Public Hearings, Pt. 1, 1984 Reg. Sess., p. 173.[7/]

These considerations were also expressed on the floor of the House of Representatives by legislators from both parties:

7/ He also noted that "[p]arties do serve useful functions. Parties serve as linkage devices between the public and government.... Parties serve as linkage devices between branches of government. But parties can't perform these functions without organization. And organization of parties is weakened by primaries and especially by adoption of a bill like 5525 which I urge your rejection of. Id. at 172.(See Leg. Add. 14a-18a).

> "[O]ur government goes forward because we have two strong party systems. We do not have two strong party systems in the State of Connecticut, but I can't help believe that it's going to strengthen our party by letting an unaffiliated voter come into one party and not participate except to cast a vote."

27 Conn. House Proc., Pt. 5, 1984 Reg. Sess., p. 1548 (Rep. Rothman, Rep.).

> The state does have an interest in preserving inviolate the integrity of its electoral process, be that in the general election or the primary election. Primary elections are instruments of the state just like general elections.... The state also has an interest in preserving the two-party system.

27 Conn. House Proc., Pt. 5, Jan. Reg. Sess., pp. 1527-28. (Rep. Cibes, Dem.).

In response to the argument that a party could select its candidates by

lottery if it so desired, the Senate Majority Leader stated: "I'm not sure that my colleague, Senator Robertson, is really serious when he says we should be able to select our candidates any way we want - by lottery, by chance - any way we want, because that candidate may end up being my Governor, my State Senator, my Congressman...."

27 Conn. Sen. Proc., Pt. 4, 1984 Reg. Sess., p. 1565, (Sen. Schneller, Dem.).

The legislative findings are well supported. The Committtee on Political Parties of the American Political Science Association has concluded:

> The closed primary deserves preference because it is more readily compatible with the development of a responsible party system. However imperfectly the idea may have worked out in some instances, it tends to support the concept of the party as an association of like-minded people. On the other hand, the open primary tends to destroy the concept of membership as the basis of party organization.

44 Am. Pol. Sci. Rev., supra, at 71 (Supp.) (1950) (emphasis in original). See also id. at 72.

Charles Evans Hughes, whose post convention primary proposal was referred to as a model for the Connecticut primary law, [8/] wrote that "[t]he failure to have a suitable party enrollment as a

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8/ 6 Conn. House Proc., Pt. 6, 1955 Reg. Sess., p. 3136.

qualification for voting at the primary...would make a travesty of party representation." 10 Nat. Mun. Rev., supra, at 26. Although he was speaking about members of one party determining the nominations of another, the legislature was justified in concluding that the same party breakdown could occur when non-members also controlled those nominations. "It [lack of a party affiliation requirement] is to confuse party nominations and independent nominations." Id.

Open primaries may weaken the influence of party leaders and membership, especially the party's "core constituencies."

> This may make individual voters feel less restricted, but insofar as it reduces the meaning of the party label and weakens the party ties of elected officials, the result hardly enhances the functioning of democracy.

Price, Bringing Back The Parties 134 (1984) (emphasis added). In view of all these considerations, the State was amply warranted in strengthening the accountability of a political party by choosing a closed primary system. The State has sought to ensure that nominations to public office are clearly those of the party and not some amorphous group. The public should know who answers for public officials and candidates.[9/]

9/ "[I]t seems fairly clear that the open primary at times makes

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Connecticut has selected the primary system which its constitutionally elected representatives concluded would promote party responsibility and effectiveness.[10/] This is a choice which a

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difficult the maintenance of orientations differentiating the two parties...." V.O. Key, Politics, Parties and Pressure Groups, supra, at 392. See also C.E. Merriam and H.F. Gosnell, The American Party System 317 (4th ed. 1949); D. Lockard, Politics Of State and Local Government 193-194 (1963); V.O. Key, American State Politics 189-191 (1956) (discussing the effect of primaries on party organization, citing data from Connecticut and elsewhere); J. White, The Fractured Electorate 104 (1983); M. Jewell, Parties and Primaries, Nominating State Governors 292 (1983).

10/ See also L. Sabato, The Democratic Party Primary In Virginia 132 (1977), discussing the Connecticut primary.

state must be able to make under "Our Federalism." Cf. Younger v. Harris, 401 U.S. 37, 44 (1971). (Black, J.).

D. The Court Erred In Treating A Major Political Party Like An Intimate Human Relationship.

The Court of Appeals committed a basic error when it compared a major political party to "'certain intimate human relationships'" such as marriage, raising and educating children and living with relatives, under Roberts v. United States Jaycees, supra, 104 S.Ct. 3244 (1984). J.S. App. 72. The court linked to "that select group of intimate relationships and bonds" support of a candidate for election. J.S. App. 73-4. This fundamental misapplication of Roberts places virtually all electoral

laws in jeopardy of previously unrecognized constitutional challenges.

In Roberts, this Court held that the Jaycees were neither small nor selective and lacked the distinctive characteristics that would entitle them to special constitutional protection. 104 S.Ct. at 3251. It was only with truly intimate groups that freedom of association was an "intrinsic element of personal liberty." Id. at 3250-51. The Jaycees in Roberts had fewer than 900 members. The Court of Appeals found that there were 477,749 Republicans in Connecticut. J.S. App. 21 n. 4. There is absolutely nothing in the record showing that the Connecticut Republicans,

a major political party controlling both houses of the Connecticut legislature and one half of the State's Congressional delegation,[11/] are small and selective. Nor could this be so when any voter can join that party by filling out a simple form that requires no loyalty oath. Conn. Gen. Stat., §§ 9-55, 9-56, 9-57.

This is one of the major defects in the opinion below. It treats the public electoral function of a major political party as just another private, internal affair.

11/ Conn. State Register and Manual 1985, pp. 119-133, 179, 181.

E. The Court Misapplied Principles Concerning A National Convention To A State Party Primary.

The Court below incorrectly relied on Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), which dealt with a national, not a state, party. J.S. App. 92-97.[12/] Its misapplication in this case threatens a vast number of election laws in all the

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12/ The vital distinction between state laws regulating a state party as opposed to a national one was recognized again in the dissent by Justice Stevens, joined by Justices Rehnquist and O'Connor, from the dismissal of the appeals in Bellotti v. Connolly, supra, 103 S.Ct. 1510 (1980). That dissent states that, "unlike Wisconsin's attempt to control delegates in a nationwide party contest, the Massachusetts rule applies to campaigns for statewide office." Id. at 1513.

States. See Amicus Brief In Support Of Jurisdictional Statement, filed in this case by New York on behalf of 15 States. ("The holding below threatens...[state] power to control any other nomination procedures, even a requirement that primary elections be held at all." Id. at 4-5).

In Democratic Party, the issue was only "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." Id. at 121 (emphasis added). The Court found that "[i]t is for the National Party--and not the Wisconsin Legislature or any court--to determine the appropriate standards for

participation in the Party's candidate selection process." Id. at 124 n. 27 (emphasis added).

Moreover, the Court in Democratic Party stated that Cousins v. Wigoda, 419 U.S. 477 (1975), which it found controlling, was decided "'in the context of the selection of delegates to the National Party Convention.'" 450 U.S. at 121.[13/]

13/ In Cousins the Court stated that the selection of national convention delegates could not be controlled by each state law. "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves

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F. The Court Improperly Used A Severe Standard Of Review That Preordains The Unconstitutionality Of Many State Election Laws.

Because of its unprecedented perception of associational rights, the Court of Appeals subjected the statute to

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coalitions cutting across state lines." Id. at 490. "[T]he pervasive national interest" had to prevail. Id. See also Novak, Rotunda and Young, Constitutional Law 786 (2d ed. 1983) ("[A] state may not attempt, as it did in Wigoda, an extraterritorial extension of state jurisdiction...."); Rotunda, Constitutional And Statutory Restrictions On Political Parties In The Wake Of Cousins v. Wigoda, 53 Tex. L.R. 935, 963 (1975). The author believed that Connecticut's law was valid. Letter to District Court, June 15, 1984, J.A. 110-15.

"strict judicial scrutiny." J.S. App. 112. This made it almost impossible to defend the law's constitutionality. Under the Court's reasoning, myriad election laws of all the states are now subject to a new attack.

The opinion below contravenes principles of review repeatedly emphasized as appropriate for election cases. See, e.g., Anderson v. Celebreeze, ____U.S.____, 103 S.Ct. 1564, 1569-70 (1983) (referring to "reasonable, non-discriminatory restrictions"); Rodriquez v. Popular Democratic Party, 457 U.S. 1, 13 (1982) (a unanimous opinion by the Chief Justice employing a "not unreasonable" standard); Storer v.

Brown, 415 U.S. 724, 730 (1974) (recognizing that there must be substantial regulation of elections). As the three-judge court said in upholding this very statute,

> 'Not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' [citations omitted]... It has never been suggested that [the rule of these decisions] automatically invalidates every substantial restriction on the right to vote or to associate.' (Emphasis supplied.)

Nader v. Schaffer, supra, at 848-49, quoting Bullock v. Carter, 405 U.S. 134 (1972), and Storer v. Brown, supra.

The constitutionality of election laws should never be judged so rigidly and mechanically. Instead, "the character and magnitude" of the alleged

constitutional injury must be considered. Anderson v. Celebreeze, supra, 103 S.Ct. 1564, 1570 (1983). Then the precise interests of the State must be identified and evaluated, including their legitimacy and strength. A decision is to be reached "[o]nly after weighing all these factors." Id. Even so, "the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions." Id. at 1569-70. The Anderson test was ignored by the Court of Appeals. Instead, it applied its own draconian one which few state election statutes could survive.

The Court of Appeals imposed a virtually insuperable burden on Connecticut when it demanded proof of a compelling state interest. J.S. App. 112. This approach conflicts with that of this Court and other circuits. See, e.g., Anderson v. Celebreeze, supra; Storer v. Brown, supra; Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985), cert den., ___U.S. ____, 106 S.Ct. 528 (1985);[14/] Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); Baer v. Meyer, 728 F.2d 471 (10th Cir. 1984); Dart v. Brown, 717 F.2d

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14/ "The courts may sometimes talk the language of least drastic means but they only strike down ballot access regulations that are unreasonable...." Id. at 1174. (Posner, J.) (emphasis added).

1491 (5th Cir. 1983). 15/

1. The Interests Of The State Are Substantial And Were Substantially Ignored.

The Court of Appeals essentially ignored the effect of the party system on public policy and government.16/ It never

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15/ In Dart v. Brown, the Fifth Circuit, in referring to American Party of Texas v. White, 415 U.S. 767 (1974) and Storer v. Brown, supra, stated: "[W]e believe Professor Tribe fairly characterizes these two opinions as a whole in stating that: '... each actually assayed the requirements by a far less demanding standard. In particular, the Court in several instances did not require whether a less restrictive alternative would adequately protect the state's interests.... The standard of review actually applied, therefore, seems to have been a mix of strict and minimal scrutiny.' L.Tribe, American Constitutional Law (1978), 783." 717 F.2d 1491, 1503.

16/ See, e.g. ch., VIII, "Party Government in the United States" in

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discussed party responsibility, let alone its importance to the public. It disregarded the legislative and political science evidence outlined previously as well as the judicial findings in Nader, supra. This violated basic principles of constitutional review.

> [W]hen a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take

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W.W. Wilson, Constitutional Government in the United States, supra, at 198-222. The party "that has served us so well might now master us if we left it irresponsible. We must see to it that it is made responsible." Id. at 220.

> judicial cognizance of all matters of general knowledge.

Muller v. Oregon, 208 U.S. 412, 421 (1908) (referring to numerous other laws and government reports). Thirty-eight states have closed primaries. See Leg. Add. 57a. A legislator noted the "great deal of comparative political research" which indicated that open primary states "have less responsive public policy decisions being made." L. Add. 18a.[17/] The legislative proceedings, excerpts of which were provided the Court, should

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17/ See, e.g., Report of the Committee on Political Parties of the American Political Science Association, quoted previously, prepared after consultation with many experts and public officials. 44 Am. Pol. Sci. Rev., supra, at vii-viii (Supp.) .

have been judicial noticed. Alaska v. American Can Company, 358 U.S. 224, 226-27 (1959); see also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (a legislative judgment that "is not manifestly unreasonable" should not be set aside.)

The legislature could find that by allowing major party nominations to be determined by non-party forces, the party's ability to carry out its programs could be impaired. The party could avoid public accountability. The unaffiliateds, in turn, would lack an organization with which to deal with officials whom they had helped nominate. The ties between the electors and the elected would weaken.

In addition, the incentive to join a political party would be lost. See, e.g., Leg. Add., 14a-41a, 55a-56a, including remarks by various legislators, the Governor, party spokespersons, and the League of Women Voters.

None of these concerns were seriously addressed by the Court below, even though they were central to the legislative history. Instead, the Court apparently made legislative and political judgments of its own in its perception of the supposedly beneficial effects of the open primary. J.S. App. 121-22.

The Court of Appeals also disregarded Storer v. Brown, 417 U.S. 724, 736 (1974), which held that

preserving political stability by prohibiting temporary party changes by candidates is "not only permissible, but also compelling." It overrides any contrary claim of associational rights. Id.[18/] Cf. American Party of Texas v.

18/ See also Developments In The Law Elections, 88 Harv. L.R. 1111, 1138 (1975), which states: "It seems undeniable that the political stability that a two-party system fosters...is a compelling state interest." Four state interests which justify party affiliation requirements were identified. Id. at 1168-1169. In addition, the Nader decision recognized that without such requirements, raiding, was possible. This was "a practice 'whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of another party's primary'" 417 F.Supp. at 846, quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973). "The Court did not say, 'voters who are members of one party....'" 417 F.Supp. at 646 n.7.

White, 415 U.S. 767, 786 (1974), ("the state may determine that it is essential to the integrity of the nominating process" to prohibit voters at a party primary from signing another party's ballot petition).

The Court of Appeals, furthermore, completely mischaracterized the State's interest when it claimed that the State was "portraying change in the political order as anathema." J.S. App. 123. It is not the status quo which is at issue here, but rather the State's ability to structure its electoral system, including primary voter qualifications, in light of its own concerns and experience. See Rodriquez, 457 U.S. 1, 8, 13-14.

The misuse of the strict scrutiny test, moreover, led the Court below to dismiss the problem of voter confusion. J.S. App. 118-119. The legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name. See, e.g., Nader v. Schaffer, supra, 417 F. Supp. at 845.[19/]

19/ "[T]hat person could be running under your label, under our label, and have nothing to do with our views whatsoever." Rep. Torpey, (Dem.), Leg. Add. 39a. See also comments by Rep. Foley (Rep.), id. at 42a.

The appellant protests in the strongest terms the Court's assertion that the State is claiming an interest "in deciding the ideological slant and bases of support for a political party." J.S. App. 119. This assertion is made without any evidence whatsoever. The State has never claimed any such interest. The party is completely free to determine whatever ideology and support base that it wants. This case only involves voter qualifications.

The Court of Appeals substantially ignores certain essential facts. The elections at issue were created not by the parties, but by the State. They are financed by the public. See, e.g., SS

9-436, 9-436a, 9-441, Conn. Gen. Stats. The State grants the nominees of major political parties automatic ballot access. It also grants them preferential ballot access over the candidates of minor and petitioning parties. §§ 9-249a, 9-379, Conn. Gen. Stats. All these privileges, granted at taxpayer expense, are keyed to the party label.

In return, the public--speaking through its elected representatives-- has a right to ensure that the nomination carrying the major party label is in fact the nomination of members of that party.

As Justice Holmes stated in referring to the advantage of official ballot access:

> It would be a strange inversion to say that no laws can be passed upon the mode of voting at a preliminary meeting held only for the purpose of getting names printed upon an official ballot when laws can be passed affecting the final vote. The Legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage.

Commonwealth v. Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902) (emphasis added).

2. The Interests Of The Party Were Grossly Inflated By The Court of Appeals.

Despite the extraordinary rhetoric of the Court of Appeals, the party's purported associational interests are de minimis.[20/] The party is free to adopt

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20/ In fact, Connecticut is among the "states offering maximum protection to party association rights by requiring voters to register their party affiliation and prohibiting

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whatever philosophy it wants and to send any message to the voters that it chooses. Nothing prevents it from polling unaffiliateds and considering their desires. Nothing prevents it from enrolling willing unaffiliateds as members.

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> changes in party affiliation after the end of the candidate declaration time. All states in this category thus pass the strict test. Not only would those states meet any party associational rights challenges, but their statutes are constructed in such a manner as to be politically beneficial to the two-party system." Carr and Scott, The Constitutionality of State Primary System: An Associational Rights Analysis, 10 J. Contemp. L. 83, 117-18 (1984)

In addition, nothing prevents a party from soliciting financial or volunteer support from unaffiliateds in a primary, or at a general election. Absolutely nothing prevents a major party from nominating candidates with bipartisan and independent appeal, if the party so desires.[21/]

In fact, one may enroll with a party up to twelve noon of the last business

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21/ See Prof. Rotunda letter, supra, J.A. 110-15. "The state law has no extraterritorial application; it does not discriminate against any party nor does it discriminate on the basis of race....[It] does not restrain the Republican Party from selecting candidates with bipartisan support.... The qualified voters in the primary can vote for whomever they wish". Id. at 111-12.

day before a primary to vote in that primary. Conn. Public Acts 84-118. This is an absolutely minimal limitation compared to the eight and eleven month enrollment cut off dates that were upheld by this Court in Rosario v. Rockefeller, 410 U.S. 752 (1973). It simply defies reason that there could be a greater associational injury when a political party is prevented from having people vote in its primaries who voluntarily elect not to affiliate with that party than when a person can not vote because of those deadlines. 22/ And the present

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22/ "Absent a willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being

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law does not even begin to compare with the statutes in Williams v. Rhodes, 393 U.S. 23 (1968), cited by the Court of Appeals (J.S. App. 79-82), which made it virtually impossible for a new party to be placed on the ballot.

The Court of Appeals acknowledged that the alleged State intrusion was "not readily apparent", and that "[i]n and of itself, legislative definition of an association's boundaries may not appear to run afoul of the first

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> abridged; without a communality of interests, there is little association to abridge." Tribe, American Constitutional Law, § 13-23 at 793 (1978).

amendment." J.S. App. 99, 101-2. The Court made the inapparent apparent because it believed that "the inexorable effect" of the statute would alter the party's message. J.S. App. 102.[23/]

23/ Of course that argument, as well as the one that there is nothing the plaintiffs may do to enforce their rule under the state statutes, could be made as to virtually all state election laws, including those cocnerning polling hours and places, legislative districts, voter qualifications and voting rights in general. In Rodriquez, supra, the Court stated: "The Commonwealth's choice to fill legislative vacancies by appointment rather than by a full-scale special election may have some effect on the right of its citizens to elect the members of the Puerto Rico Legislature; however, the effect is minimal, and like that in Valenti, it does not fall disproportionately on any discrete group of voters, candidates, or political parties." 457 U.S. at 12.

457 U.S. at 12. The lower court in Roberts v. Jaycees, supra, had also assumed that "'some change in the Jaycees' philosophical cast can reasonably be expected'" if women were admitted. 104 S.Ct. at 3255. This Court, in reversing, condemned this supposition as unsupported by the record. Id.

Similarly, there is nothing in the record in this case to substantiate the assumptions of the Court of Appeals. The Court stated that the party subcommittee which proposed the plaintiffs' rule had reached certain conclusions. J.S. App. 22. A proposed stipulation to this effect, however, was withdrawn in the

District Court by mutual consent. J.S. App. 249-50, 281-2. The trial court made no such finding. The Court of Appeals simply misread the record.

The withdrawal followed discovery proceedings which suggested that the rule may have been motivated at least in part by the personal interests of one of the individual plaintiffs as distinguished from that of the party.[24/]

24/ In 1982, Senator Weicker was challenged for renomination by Prescott S. Bush, Jr. The Senator said then that without "some drastic restructuring of the state G.O.P. and an influx of non-Republican voters that Mr. Bush could win the Republican primary." The Senator tried to solicit independents to register Republican for the purpose of the primary. J.A. 116-129. See also depositions of Thomas D'Amore and Peter Gold, placed under seal by the District Court.

In addition, plaintiffs' claim that the subcommittee had reached various conclusions was not substantiated by some subcommittee members deposed. See depositions of Rep. Mae Schmiddle, July 13, 1984, pp. 27-37, 45-46, and Sen. Fred H. Lovegrove, July 13, 1984, pp. 8-10. Rep. Schmiddle testified as follows:

> Q. ... Please feel free to indicate whatever changes that you would make if you had to draft that [plaintiffs' alleged conclusions of the party sub-committee which the Court of Appeals later cited].
>
> A. You know, I sort of feel that the way in which this is phrased, it sort of is putting words in the mouth of all Republicans or maybe words in the mouth of the Republican Party ...." Dep., p. 34.

In addition, assertions by the Court of Appeals as to legislative motivation

(J.S. App. 108-9) are also completely unsupported by the record.[25/] Here again, the trial court made no such findings. The same is true of the charge that the statute had been "enacted by a Democratic controlled state legislature." J.S. App. 101. Not only is this devoid of any evidentiary support, it is simply incorrect. In the 1955 legislature that passed this law, the Republicans had a two to one majority in the House of Representatives. Conn. State Register and Manual 1985, p. 180.

25/ Such inquiry is improper in any event. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975); Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 130 (1810).

Finally, in weighing the party's interest, the Court overlooked the fact that the delegates who adopted the rule were holdovers from a prior convention, and as one Republican legislator complained, had not been selected "to make a decision on an issue such as this." 27 Conn. House Proc. Pt. 5, 1984 Reg. Sess., p. 1549.[26/]

G. The Opinion Below Has Far-Reaching Implications Impairing Orderly State Election Administration.

26/ The delegates were those who attended the 1982 Convention. Less than 60% of the convention voted for the rule. J.A. 49-64, 71-72. A resolution which would have required a majority of town committees to endorse the rule was defeated. J.A. 76 (Res. 10), Joint Subm. Docs., Ex. N.

State regulation of elections is needed "'if some sort of order, rather than chaos, is to accompany the democratic processes.'" Anderson v. Celebreeze, supra, 103 S.Ct. at 1569 (quoting Storer v. Brown, supra, at 730). The validity of state election laws cannot depend on the passing fancies of political conventions.

If a single party may veto the state primary law in this case, then many other election statutes may fall by the same logic.[27/]

27/ These include in Connecticut, the right to a primary by a candidate who receives at least 20% of the convention vote, § 9-444, C.G.S.; the right to a primary to begin

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In addition, the party rule in this case will by itself generate enormous

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with, id.; the right to primary for municipal and certain party offices by obtaining sufficient petition signatures, §§ 9-406, 9-407, C.G.S.; the right to absentee ballots for a primary, ch. 144a, C.G.S.; party enrollment rights provided by law in the face of any conflicting party rules concerning loyalty oaths, test for affiliation, and durational residency requirements, see §§ 9-23a, 9-56, 9-57, C.G.S.

The court's dictum (J.S. App. 129-30) that the State could simply limit the ability of a party to change its rules does not even begin to address these concerns and is inconsistent with the court's premise of party insulation from state laws. It could also spawn further litigation based on strict scrutiny, and create widespread uncertainty and confusion in all the states.

confusion and disorder for election administrators. Different voting qualifications, that would apply unevenly and irregularly to various parties and to various offices, would have to be enforced.[28/]

Under the party rule, unaffiliateds could not vote for all offices such as State Senator and Representative. Separate and distinct ballot labels would

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28/ Prof. Rotunda stated that under plaintiffs' rule, "the burden on state election judges may well be heavy and the confusion on the voters great." J.A. 113. The Governor's veto of a bill which would have authorized the party rule referred to the "administrative chaos" that would be created for state and town officials. Leg. Add. 56a-57a. The legislature sustained his veto. Id. 57a.

therefore be needed for unaffiliateds either on the same or additional voting machines. J.S. App. 244 at 268-269, ¶46.

Unaffiliated voters, moreover, would have to be separated from members of the other major political party. Id. at 267-268, ¶45; 269, ¶47. Additional, specially trained officials and more voting machines would probably be required. Id. at 269, ¶48.

The record also contains evidence that absentee ballot administration under the rule would require extreme care and would probably result in considerable confusion and many mistakes. J.S. App. 288, 293-298; see also id. at 286-287, ¶52.

Moreover, all this would have to be done amidst the pressures and uncertainties that already exist at polling places on primary day. The administrative burdens would fall largely on part-time moderators, assistant registrars, checkers, machine tenders and absentee ballot counters, most of whom serve at no more than one or two elections a year.[29/]

29/ Sen. Weicker admitted these burdens would be costly. Leg. Add. 9a. See also remarks by Rep. Foley, Rep. Cibes, Sen. Schneller and Governor's Veto Message, Leg. Add., 13a, 43a, 46a-47a 56a-57a. "[H]ere we are mandating costs for municipalities without providing compensation for them." Rep. Foley (Rep.), id. at 13a.

Furthermore, the opinion of the Court of Appeals does not prevent one from voting in both party primaries if permitted by party rules.

The State, under the Court of Appeals ruling, could not pass uniform primary legislation unless parties consent. Party rules would thereby be given a practical veto over State law, and the party would become a legislature unto itself.

II. The Opinion Below Ignores The Constitutional Role Of The States In Setting Voter Qualifications And Regulating Elections Under Art. I, SS 2 And 4, And the Tenth And Seventeenth Amendments.

The Court of Appeals essentially ignored those portions of Article I, SS 2

and 4, and the 10th and 17th Amendments that empower States to set voter qualifications and regulate elections.

Madison stated that the election of the House of Representatives would depend upon the State legislative authority in the first instance, "and will, probably, forever be conducted by the officers and according to the laws of the States." The Federalist, No. 44, p. 307 (J. Cooke ed. 1961). Voter qualifications were to be "conformable to the standard already established, or which may be established, by the State itself." The Federalist, No. 52, id. at 354[30/]

30/ The concurring opinion relied on a Federalist text which used the word

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"comfortable." J.S. App. 137-38. However, the J. Cooke edition (1961), quoted by the majority, uses the term "conformable." J.S. App. 48. The term "conformable" is the one also used in the earliest collected edition, The Federalist; A Collection of Essays, Written in Favor of the New Constitution Agreed Upon by the Federal Convetion September 17, 1787 (M'Lean pub. 1788), Vol. 2, p. 123 (copy which belonged to Thomas Jefferson), held by the Library of Congress, Thomas Jefferson Bldng., Rm. 204. Telephone conversation with Peter Van Wengen, librarian, rare books and manuscripts, Library of Congress, Feb. 14, 1986. The 1961 Rossiter edition cited by the concurring opinion states that its text is taken from the "'"McLean edition 'of 1788'" Id. at xvii. The word "conformable" is also used in The Federalist, On The New Constitution, Written in the Year 1788, ("The numbers written by Mr. Madison corrected by himself") M'Carty and Davis pub. 1826) at p. 295 (Conn. State Library), as well as other editions reviewed.

Under the Constitutional distribution of powers, the States initially determine voter qualifications for members of Congress as well as State offices. Storer v. Brown, 415 U.S. at 729-730; Katzenback v. Morgan, 384 U.S. 641, 647 (1966) (citing Art. I, § 2 and the 17th Amendment). Moreover, as Justice Black wrote in Oregon v. Mitchell, 400 U.S. 112, 125 (1970): "[A]rt. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4."[31/]

31/ In that case the 18-year-old minimum age requirement of the Voting Rights

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Just last Term, this Court stressed "the States' 'residuary and inviolable sovereignty,'" recognizing that:

> The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1.

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> Amendments of 1970 was upheld for national elections, but invalidated for state and local elections. In addition, provisions barring literacy tests in all elections, and residency requirements in Prsidential elections were sustained.

Garcia v. San Antonio Metropolitan Transit Authority, ____U.S. ____, 105 S.Ct. 1005, 1017, 1018 (1985).

As stated by one of the sources cited by the concurring opinion below:

> This [Art. I, § 2] left the existing qualifications of each state in force within its bounds, avoided all interference by the Federal Government, and secured to the states the right to prescribe the qualifications for their own and federal voters.

D. Hutchinson, The Foundations of the Constitution 31 (1975). 32/

32/ This sentence immediately follows the portion quoted in that opinion, but was omitted from it. J.S. App. 134-35.

Article I, § 4, furthermore, provides that the manner of holding Congressional elections "shall be prescribed in each State by the Legislature thereof," subject to regulations made or altered by Congress. It does not vest this power in a political convention.

The Court of Appeals' decision thus severely undercuts Congress's power to deal with primaries as it does that of the States. The power of Congress under § 4 flows in the same channel as does that of the States. "[T]he conferring of the power on the States and the reservation of the authority in Congress were absolutely coterminous," except as

to the place of voting for Senate. Newberry v. United States, 256 U.S. at 262. (White, C.J., dissenting but concurring in part.)

Art. I, § 4, should be interpreted so as to effectuate, not defeat, its purpose. United States v. Classic, 313 U.S. 299, 316 (1941).[33/] A mere disagreement between the State and a political element should not be enough to nullify a state election law. Otherwise, the essential electoral authority

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33/ "For if there is to be no control of the process which presents men for election, the value of the control over the election is largely gone." Note, Federal Control of Senatorial Primary Elections, 22 Col. L.R. 54, 56 (1922).

allocated by the Constitution would unravel. [34/]

Furthermore, with respect to state elections, Justice Black stated in Oregon, supra:

> It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.

400 U.S. at 125.

The 14th, 15th, 19th and 24th Amendments

34/ "...[T]he Constitution is not self-destructive. In other words, ... the powers which it confers on the one hand it does not immediately take away on the other...." Billings v. United States, 232 U.S. 261, 282 (1914).

each assume that the states have general election supervision. Id. at 125-26. Moreover, the 14th Amendment did not "strip the States of their power, carefully preserved in the original constitution, to govern themselves." Id. at 127. States can set voter qualifications for their own officials, in the absence of specific constitutional limits. Id. at 125, 135. For example, State election authority is coordinate with the 15th amendment and "one may not destroy the other without bringing about the destruction of both." Guinn v. United States, 238 U.S. 347, 362 (1915).

Unless the judgment below is reversed, this legislative discretion

protected by the Constitution will be subverted.

III. The Party Rule Violates Art. I, § 2, And The Seventeenth Amendment Because It Sets Different Voter Qualifications For Congress Than It Does For The State Legislature.

The Court of Appeals found it "unnecessary" to decide the meaning of Art. I, § 2, and the 17th Amendment because it held that the voter qualifications clauses did not apply in primaries. J.S. App.41 n. 11. The Court thus severed important constitutional protections of voting rights from an integral part of the election process.

A party rule must itself be "constitutionally permissible."

Democratic Party of the U.S. v. Wisconsin, supra, at 123 n. 25; Cousins v. Wigoda, supra, at 491. Art. I, S 2, cl. 1, of the Constitution provides that "...the Electors [for U.S. House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The 17th Amendment includes virtually identical language with respect to electors for U.S. Senate.

In Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Stewart, in an opinion concurring and dissenting in part, joined by the Chief Justice and Justice Blackmun, stated:

> The Constitution thus adopts as the federal standard the standard which each State has chosen for itself.... Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment....
>
> ...[N]o State may establish distinct qualifications for congressional elections .... [T]he States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature.

Id. at 288-289 (emphasis added).

(citations omitted). [35/] See also

35/ Justice Stewart suggested that with respect to state residency requirements for voting for federal office, Congress might prescribe different qualifications because of powers existing elsewhere in the Constitution. There was no question, however, but that a state was not free to do so. There was no dispute on this point in any of the other opinions in that case.

Katzenbach v. Morgan, 384 U.S. 641, 647 (1966); Ex Parte Yarbrough, 110 U.S. 651, 663 (1884).

In Federalist No. 39, Madison stated that in the U.S. House, the people of America would be represented "on the same principle as they are in the Legislature of a particular State." J. Cook ed. 1961, p. 255. He emphasized in Federalist No. 57:

> They [the electors] are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State. Id. at 385.[36/]

36/ It is significant that the commentator quoted in the concurring opinion below stated that a new qualification would have excluded "some from voting for members of

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Under plaintiffs' rule, unaffiliated voters not qualified to vote for State legislative offices in Republican primaries would nevertheless vote for Congress in those primaries.[37/] This

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> Congress, who would be able to vote for members of the state legislatures, or vice versa." Hutchinson, supra, quoted in Republican Party, et al. v. Tashjian, (emphasis added). J.S. App. 134-135. In the Constitutional debates, Madison stated that Congress would include "representatives elected by the same people who elect the state legislatures. Surely, then, if confidence is due to the latter, it must be due to the former." 5 Elliott's Debates on the Adoption of the Federal Constitution 402 (1859 ed.)

37/ Party membership has been specifically recognized as one of

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defeats the Constitutional purpose of having the people represented in Congress on the same principle that they are in their State Legislature.

The Court of Appeals claimed that the qualifications clause was not even discussed in United States v. Classic, supra. J.S. App., 53-4. Yet the Classic Court relied upon all of Art. I, § 2, cl. 1, including the qualifications section. The right to vote was secured by the Constitution "to qualified voters" for

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> the qualifications for voting under the same law involved here. See Nader v. Schaffer, supra, 417 F.Supp. at 842 n. 4, quoting Smith v. Allwright, 321 U.S. 649, 664 (1944).

the House of Representatives, and was "thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2," as well as § 4. 313 U.S. at 310. See also id. at 314, 315. In fact, the decision upheld the rights of voters qualified under state law to have their votes properly counted in a primary. Id. at 308.

In addition, this "constitutional command [Art. I, § 2] is without restriction or limitation....[and] is secured against the action of individuals as well as of states." Id. at 315. See also Smith v. Allwright, supra, 321 U.S. at 663-64 (voter qualifications in a

state primary are not matters of private law); Buckley v. Valeo, 424 U.S. 1, 11-14 n. 16 (1976) (Congress may regulate Congressional and primaries under Art. 1, § 4).[38/]

The Court of Appeals improperly divorced the "Electors" provision in Art. I, § 2 and the 17th Amendment from its application to primaries. J.S. App. 55.

> It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

38/ For application of Federal Election Campaign Act to primaries, including reference to Connecticut in the House Report, see Leg. Add. 2a-7a.

This illustrates another one of the major problems raised by the opinion below. A party is permitted to do what a State probably could not. Arbitrary voting qualifications may be imposed without any legal or public accountability,[39/] as state election laws collapse whenever a political party dissents.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed and that

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39/ This is an example of the arbitrary action that Hughes had observed could result from primaries not regulated by law. 10 Nat. Mun. Rev., supra, at 24. No real rationale was ever given for the disparate qualifications under the rule. See Leg. Add. 9a-12a

the case should be remanded with the direction that judgment be entered for the defendant.

Respectfully Submitted

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ADDENDUM OF LEGISLATIVE MATERIALS

Note: The complete record of the 1984 Connecticut General Assembly public hearings and floor debates, excerpts of which are included herein, were submitted to the District Judge. Excerpts were also included in the addendum to the defendant-appellant's brief in the Court of Appeals.

FEDERAL ELECTION CAMPAIGN ACT

AMENDMENTS OF 1979

Title 2, United States Code

* * *

§ 431. Definitions

When used in this Act:

(1) The term "election" means-

(A) a general, special, primary, or runoff election....

* * *

CODE OF FEDERAL REGULATIONS

Title 11 - Federal Elections

§ 100.1 Scope

This subchapter is issued by the Federal Elections Commission to implement the Federal Election Campaign Act of 1971 (Pub. L. 92-225), as amended by Pub. L. 93-443, Pub. L. 94-283, Pub. L. 95-216, and Pub. L. 96-187.

§ 100.2 Election (2 U.S.C. 431(1)).

(a) "Election" means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office. The

specific types of elections, as set forth at 11 CFR 100.2 (b), (c), (d), (e) and (f) are included in this definition.

* * *

(c) Primary Election. A primary election is an election which meets one of the following conditions: (1) An election which is held prior to a general election, as a direct result of which candidates are nominated, in accordance with applicable State law, for election to Federal office in a subsequent election is a primary election.

* * *

HOUSE REPORT NO. 96-442 RE
FEDERAL ELECTION CAMPAIGN
ACT AMENDMENTS OF 1979

(Referring to Connecticut)

* * *

Section-by-Section Explanation of the Bill

DEFINITIONS

Section 101 of the bill amends section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431). The section is amended as follows: (1) Election. There has been no change in the definition of election. A convention

or caucus of a political party which has the authority to nominate a candidate is considered a separate election and, thereby, has separate reporting obligations and contribution limitations. The test is whether the convention or caucus has the authority to nominate, not whether the convention actually nominates. For example, in the state of Connecticut, State law requires the district convention to choose a candidate for nomination as the party-endorsed candidate; if, however, another candidate at the convention receives at least 20 percent of the vote, a primary election is required. Since the district

convention has the authority to nominate, it would be considered an election. If a primary is held after the convention, the primary would be considered another, totally separate, election. On the other hand, an endorsing convention like the one held in Minnesota would not be considered an election since its function is to endorse a candidate who will actually be nominated in a subsequent primary.

* * *

H. Rep. No. 422, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Ad. News 2864 (emphasis added).

1984 Legislative History

The following consists of excerpts from the debate in the 1984 Connecticut General Assembly and the public hearings of the Assembly's Joint Committee on Government Administration and Elections on proposed amendments to § 9-431, Conn. Gen. Stats., the law involved in this case.

1984 Public Hearings, Connecticut General Assembly Joint Committee, Government Administration And Elections Concerning Proposed Amendments to § 9-431

REP. ATKIN:...How about in the situation, the way the rule, as I understand it is written, you would have a primary, say

for a Congressional candidate, but not for a state rep. candidate. How would you amend that situation, if there happened to be both running in a certain state legislative district. Would somebody have to go into -- an unaffiliated voter could only in that case vote for a congressional candidate, but not a state rep candidate. Wouldn't that be a costly proposal?

SEN. WEICKER: That's correct. I think that now, and I can only guess at the motivation of the delegates....

I would imagine that it was the human instinct, or the human drive on the

part of those 900 Republicans that they just didn't want to swallow everything in one bite. They wanted to see how the system worked....

Public Hearings, Conn. Gen. Assembly, Joint Com. Govt. Admin. And Elections, Pt. 1, 1984 Reg. Sess., p. 152.

* * *

SEN. DANIELS: I think John asked Sen. Weicker this question, and I'm not sure that I understood his answer. What is the rationale of allowing unaffiliated voters to vote in the United States primary while preventing the same voter

from voting in a state primary held the same day and at the same polling places?

REP. BERMAN: I'm not sure, Senator. The proposal that I had introduced four years ago would have allowed voter to vote in any primary.

* * *

SEN. DANIELS: Well, I'll ask the minority representative the same question. Thank you.

My question, is, what is the rationale in this bill of allowing unaffiliated voters to vote for the United States candidate in a primary, and

at the same time would prevent unaffiliated voter from voting in a state senate primary held the same day, and obviously using the same polling places.

REP. SCHMIDLE: Thank you, Sen. Daniels. The bill that is before us. The bill that we are having a public hearing on, does not address any exclusionary provisions. It simply says, that a party by its own rules may do what it chooses, and it doesn't address for whom people may vote, or for whom people may not vote. That's not addressed in this bill, sir.

Id. at 157-158.

* * *

REP. FOLEY: Sure. -- of using multiple machines, and certainly we would have to have two machines each district. If the Democrats decided to have the unaffiliates also within their primary at a future date, it might mean four machines.... [H]ere we are mandating costs for municipalities without providing compensation for them.

Id. at 161.

* * *

REP. CIBES:...I do have a Ph.D. in political science. And as Senator Weicker should know, parties do serve useful functions. Parties serve as linkage devices between the public and government. Parties serve as linkage devices between branches of government. Parties serve as recruiters and socialization devices. But parties can't perform these functions without organization. And organization of parties is weakened by primaries and especially by adoption of a bill like 5525 which I urge your rejection of.

There is a particular problem with House Bill 5525. It is really improperly drafted. As drafted, it lets unregistered voters vote if party rules provide. It would let felons vote if state party rules provide. It would let people who are not residents of a municipality vote in a party primary if state party rules provide. It would let non-citizens of the United States vote in party primaries if party rules would provide. It would permit unaffiliated voters to vote in the primaries of both parties should the state party rules of both parties so provide.

It would let state party rules provide that in the -- say the 40th Assembly District, unaffiliated voters could vote but not in the 39th Assembly District. Or in the 1st Congressional District and not in the 2nd Congressional District. It would as I would further read 5525 permit a voter to vote without demonstrating his identity despite the moderator's request that he do so.

Now, certainly it is unlikely that any of these things will happen. Surely the intent of 5525 is merely to permit unaffiliated voters to vote in some circumstances but I think they're good

examples of what can happen if public policy decisions are delegated to private organizations.

* * *

And I would submit as well that the public at large does have an interest in maintaining strong party organizations with coherent policies clearly competitive with each other. And permitting unaffiliated voters to vote not to mention the other horrible things that could happen if state party rules would so provide, permitting unaffiliated voters to vote in party primaries provides a possible end run around the

party faithful. It weakens parties and it weakens party competition. And I don't think the public at large would be well served by the passage of 5525.

Id. at 172-173.

* * *

I don't know the answer to how many states permit unaffiliateds to vote. I do know that there is a great deal of comparative political research which indicates that in states which are weakened by party reforms such as proposed, basically have less responsive public policy decisions being made then in states where parties are closed to members of political parties only.

Id. at 173-174.

* * *

MS. MARGARET BERG: Members of the committee and Mr. Chairman. I'm Margaret Berg and I'm testifying for the Caucus of Connecticut Democrats in opposition to Raised Committee Bill No. 5525 for the following reasons.

First, the theory behind this bill is that a party should not be subject to state law but should be able to decide for itself how candidates are chosen.... This is a permissive law that sets a dangerous precedent. The integrity of

the election process is at stake when such a vital part of the process as candidate selection is taken out from under the protection of the state election law.

Would the parties protect the voters' right to free choice, for instance? As Election Attorney Albert Lenge asked in an early January article in the Hartford Courant. What if the party were to decide that there would no longer be any primaries allowing the party leaders to select a candidate with no way to challenge the closed monopoly? The change contemplated by the republicans

and with this bill would make is merely cosmetic. It doesn't give the unaffiliates anything they don't already have....

I feel that the party primary would weaken the party. It would -- unaffiliates would lose their incentive to join a party. Second, parties would be weakened because party members and workers would lose their incentive to stay in the party. Particularly if both parties opened up their primaries to unaffiliates as probably would be the case if this bill passes.

And third, the principles of a party would be weakened because candidates would have to appeal to voters not necessarily committed to those principles. So, I think it's a bad bill. It's bad for republicans. It's bad for unaffiliates and bad for democrats.

Id. at 186-188.

* * *

MS. NANCY BEALS [League of Women Voters of Connecticut]

The League of Women Voters has always worked to promote full participation in the political process by citizens of voting age....

Primaries, like caucuses and conventions, are part of a party's nominating process. And we believe that only enrolled party members should be eligible to participate in party nomination processes....

Party membership is open to all and in no way restricts a voter's freedom to choose among candidates on election day....

We support the concept of a strong two party system and we are concerned that permitting unaffiliated voters to vote in primaries may weaken rather then strengthen the two party system by removing one of the most important incentives for party membership. We urge an unfavorable report on House Bill 5525.

Id. at 189.

* * *

MR. FITZGERALD: [Chairman of the Connecticut Democratic State Central Committee]. I do not believe the legislature should give the republicans or any other party carte blanche to do whatever it wants to do however it wants to do it. What's fair for the goose is fair for the gander. The state has a legitimate interest in maintaining the strength of the two party system and this legislature certainly should decide this issue of party membership one way or the other for both parties. To let one party

do its thing regardless of state policy considerations is dangerous. And it's also a cop out.

This legislature should decide whether party membership will continue to mean something in the State of Connecticut or whether it will be reduced to a nullity. It should be the same law for both parties.

Remember, ladies and gentlemen, a long leash may be pulled in many directions. Those who agree with the direction of the republican leadership at the moment and who wants to give them free rein should realize that at some future date, future

leaders could use those reins to gallop off in the opposite direction.

I believe in the political process. I believe in the two party system. And I believe without any hesitation that this proposal will weaken the two party system.

Id. at 194-195.

* * *

1984 House Proceedings Rejecting Amendments to § 9-431

REP. CIBES (39th d.): Mr. Speaker, I, too, urge rejection of this amendment. The state does have an interest in

preserving inviolate the integrity of its electoral process, be that in the general election or the primary election. Primary elections are instruments of the state just like general elections. And the state has an interest in insuring that the primary elections are honest, they're conducted above board.

And, as a token of that interest, the state pays for the primary elections in the state. The state has a legitimate interest in preventing unaffiliated voters from voting in both the primaries which this particular amendment would not forbid. So, that an unaffiliated voter

would have an advantage, Mr. Speaker, by being permitted to vote in both the Democratic and Republican party primaries, should the party rules so provide.

[T]he state also has an interest in preserving the two-party system.

In insuring that in primary elections, strong party organizations are preserved, that they have coherent policies, that the parties are clearly competitive with each other. Probably the most eloquent statement of the interest of the state has been set forth in a case which is often cited to support

the Weicker proposal, but which in reality does not. The Honorable Judge in Nater [sic] versus Schaeffer in 1976, pointed out that there are interests of the state, legitimate interests of the state, in preserving the party primary to party members only. If a party were completely private organization, the judge said, it could limit participation in its nominating process to party members. And, Mr. Speaker, I would submit that if a party were a completely private organization, it could open its doors to anyone that saw fit.

But it isn't a completely private organization. It's a regulated situation and in that circumstance where the state has an interst, the state has a legitimate interst, I'm quoting now, in protecting party members' associational rights by legislating to protect the party from intrusion by those with adverse political principles.

In short, the state has an interest in preventing raiding by unaffiliated voters or potentially, if this situation expands, by members of the other party. A state has a more general, says the Judge, but equally legitimate interest in

protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and indentifiable interest groups, insuring that the results of the primary elections in a broad sense accurately reflect the voting of party members.

Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies and presenting [sic] fraudulent and deceptive conduct which mars the nominating process.

One of the more explicit Supreme Court cases in this regard is Rosario versus Rockefeller in 1973. In which the court held that the State of New York did, indeed, have an interest, not just in insuring that only party members voted in party primaries, but also the state had an interest in a lengthy waiting period to permit unaffiliated voters to enroll in parties.

....

This was certainly legitimate, for even the dissenters, because the dissenters said, a state does have an interest in preventing such behavior, raiding of parties, less the efficacy of

the party system and the democratic process, its usefulness in providing a unity of divergent factions in an alliance for power, would be severely impaired.

And certainly, the majority in Rosario versus Rockefeller, would have permitted such a very lengthy waiting process. It is clear that the preservation of the integrity of the electoral process is a legitimate and valid state goal.

I believe the General Assembly, by rejecting this amendment, would preserve the state's interest in preserving the integrity of the electoral process.

I urge the defeat of this amendment.

27 Conn. House Proceedings, Pt. 5, 1984 Reg., pp. 1527-31.

* * *

REP. ROTHMAN (111th):.... [T]he problem I have is what if my party decides to only let white males who are 24 years of age decide what my party want to do, or the rules. What if my party decides to let 16 year old vote in the primary elections or in our party rules?

I have some real problems with that and though I'm told that this is a far-out situation, certainly the last few

speakers spoke of situations which are even further away from what we're talking about.

The other thing I would just call your attention to, the theory in political science is that our government goes forward because we have two strong party systems. We do not have two strong party systems in the State of Connecticut, but I can't help believe that it's going to strengthen our party by letting an unaffiliated voter come into one party and not participate except to cast a vote.

I have to also go one step further. Because it has been said here that this came out of the convention and it is supported by Republicans. My friends, the convention that we had was not a newly called convention. The convention that we had was a convention that brought together people who had been selected to vote for candidates, not to make a decision on an issue such as this. I have some real problems with that.... Id. at 1548-49.

* * *

REP. RYBAK (66th):....But in my part of the State, this is still pretty much the rule. You register with a party and you

take an active role in the party on the local level. That's what makes our government in the small towns pretty fine government.

This amendment doesn't really open up the process at all. This amendment is kind of a public image amendment, if you will. Because the real action isn't the primary, the real action is the caucus.

....

Secondly I'd like to say I haven't had one unaffiliated voter call me in favor or this proposal.... [C]ertainly they haven't been knocking my door down.

And finally I'd like to close by saying in my part of the state, the Republican delegates and the Republican town chairman in my district oppose this proposal. And I think I'm representing them, the unaffiliated voters and the Democrats when I'm voting against this proposal.

Id. at 1550-51.

* * *

REP. TORPEY (11th):....I think a very important point is being overlooked in this process. And that is the responsibility of the parties. And by

responsibility what I'm referring to is when the candidate is running with a party label on it, that candidate should be representing the views of that party.

And if you've got people voting for the candidate that is not a member of your party, you haven't any idea where he stands. And that person could be running under your label, our label, and have nothing to do with our views whatsoever. And yet we should be held responsible as a party, whatever that representative or that candidate, if he's elected, stands for.

[I]t is very conceivable that the candidate that is out representing your party, the vast majority of your party would not support him or his positions. And therefore it's incumbent upon the parties to put up candidates, their candidates, representing their views, and if the unaffiliated want a different candidate, let him run as an independent on his own platform, standing on his own record.

Id. at 1551-52.

* * *

REP. FOLEY: (131st) ....

I recall at the public hearing on this matter, again, court cases, Wisconsin, New Jersey, North Carolina,... wonderful states, but no one ever seems to talk about Connecticut....

But in Connecticut, the court has ruled on this in Nader versus Schaeffer. The court in its opinion said, in addition to protecting the associational rights of party members, a state has a more general but equally legitimate interest in protecting the overall integrity of the historic election process. This includes preserving parties as a viable and identifiable interest groups, insuring

the results of primary elections in a broad sense accurately reflect the voting of party members, parties should be able to avoid primary election outcomes which will confuse and mislead the general electorate to the extent it relies upon party labels as a representative of certain ideologies, by preventing fraudulent and deceptive conduct which mar the nominating process.

I would submit to you this amendment as is the entire Weicker proposal, will in fact lead and mislead the voters on that path.

Id. at 1557-58.

* * *

REP. CIBES (39th): Mr. Speaker, it is my understanding that on primary days, those lists of additional unaffiliated voters are not available in the polling places on primary. And that therefore there would be an additional expense to the municipalities providing that list of unaffiliated voters in addition to the list of enrolled party members.

[T]hat's one of the reasons I would oppose this amendment, because of the additional mandated cost to municipalities.

Id. at 1587.

1984 Senate Proceedings Rejecting Amendments To § 9-431

SEN. ROBERTSON:...How each team selects their players, their line-up for the competition on election day, should be done and determined by each of those teams individually... If we decide to do it by a lottery, if we decide to pull straws out of a hat, if we decide to do it any way we wish, we should be entitled to do that....

27 Conn. Sen. Proc. pt. 4, 1984 Sess., p. 1560.

SEN. SCHNELLER:...I'm not sure that my colleague, Senator Robertson, is really serious when he says we should be able to select our candidates any way we want - by lottery, by chance - any way we want, because that candidate may end up being my Governor, my State Senator, my Congressman, and so I think there ought to be some kind of rules and some kind of order in the process by which we select candidates that run for office, and I don't think that any frivilous [sic] way any party chooses to select their candidates should be the law of this state. I think there should be a process. It should be an orderly process

and we ought to have some rules. I think one of the things that concerns many of us with the so-called Weicker Proposal that would allow unaffiliated voters to vote in a primary is that it selected certain candidates that would have unaffiliated voters select them. As I recall it, it was the Presidential, it was the Congressional, the U.S. Senatorial, and I've asked many of my Republican colleagues what would happen if we have primary on the same day for a Congressional candidate and a State Senatorial candidate. How would that process work? I guess you could have separate booths for certain candidates

and other booths for other candidates and I don't know how your're going to distinghish [sic] between the unaffiliated party voter and the party voter who can only vote in one booth. I don't really feel it's a very well thought out proposal. As a matter of fact, when I asked one of my Republican colleagues how they proposed to work it out, the answer I got was, "We're hoping you will take care of us by defeating it when it reaches the floor of the House or the Senate." All of us know that was a compromise proposal that was worked out at the last minute so that it would pass muster at a convention, but it really

wasn't a very well thought out proposal, so that I think we ought to have some rules that are fair, that pass statutory muster because the candidates that are selected through this process are candidates that will govern you and me and I think we want to feel comfortable in the manner in which those candidats are selected so that to just allow parties, willy-nilly, to select their candidates in any manner that they choose, by lottery, to use Senator Robertson's phrase or any other process, I think would be detrimental to the Republican Party, to the Democratic Party and any other party so that the manner in

which this amendment would is worded is something that I think would be detrimental to both parties and I would certainly urge you to vote against it.

Id. at 1565-67.

Senate Bill No. 5

PUBLIC ACT NO. 85-320

(Vetoed by the Governor;
Veto sustained by the Legislature)

AN ACT PERMITTING UNAFFILIATED VOTERS TO VOTE IN CERTAIN PRIMARY ELECTIONS.

[capitalized language is added by the amendment; bracketed language is deleted by it]

Section 9-431 of the general statutes is repealed and the following is substituted in lieu thereof:

[No] EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, NO person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be, but any such person offering to vote and being challenged as to his identity or residence shall, before he votes, prove by the testimony, under oath, of at least one other elector qualified to vote in such primary or by

such other evidence acceptable to the moderator either of the following which are applicable: (1) His identity with the person on whose name he offers to vote or (2) his bona fide residence in the municipality or voting district, as the case may be, provided if any person who has moved from one voting district or ward to another voting district or ward within a municipality is entitled to vote in such primary under section 9-54, such person shall not be required to prove his bona fide residence in the voting district or ward from which he moved. The rules of each party in each municipality shall prescribe whether

members of the town committee shall be elected from the municipality at large, in which case any person on the last-completed enrollment list of such party in such municipality shall be eligible to vote in a primary for the election of such committee members, or whether such committee members shall be elected from political subdivisions of such municipality, in which case only persons on the last-completed enrollment list of such party in such a political subdivision shall be eligible to vote in a primary for the election of such committee members from such political subdivision; provided no town committee

in any municipality shall be elected both at large and from political subdivisons.

Vetoed June 28, 1985. Veto sustained July 22, 1985.

VETO MESSAGE OF GOVERNOR
OF THE STATE OF CONNECTICUT
FOR P.A. 85-320, AN ACT
PERMITTING UNAFFILIATED VOTERS
TO VOTE IN CERTAIN PRIMARY ELECTIONS

I am returning herewith, without my approval, Senate Bill No. 5, Public Act 85-320, entitled, "An Act Permitting Unaffiliated Voters to Vote in Certain Primary Elections".

This bill would enable a state political party to adopt rules which would permit voters who are not members of that party to participate in a primary. Under current law, no person is allowed to vote in a party primary who is not enrolled as a member of that party.

However, under Connecticut's lenient registration law, any unaffiliated voter may vote in a party's primary simply by enrolling in that party up to the day before the primary.

Following Judge Cabranes' federal district court decision holding Connecticut's primary law unconstitutional, I said that, if this decision were allowed to stand, it would lead to the demise of the two-party system, because this bill could allow a voter, by remaining unaffiliated, to vote in either party's primaries, or perhaps, both parties' primaries. Party

registration would thus become a detriment.

In addition, this bill in unfair, because it fails to spell out that primaries for all elected offices should be open to participation by unaffiliated voters. It allows political parties to pick and choose which primaries are open to such participation, and allows the parties to change the eligible primaries when it becomes politically expedient to do so. If the parties were thus allowed to change their rules from election to election, this would create administrative chaos in the Office of the

Secretary of the State and the offices of Town Clerks.

Therefore, I do not approve Senate Bill No. 5, Public act No. 85-320.

Vetoed June 28, 1985. Veto sustained July 22, 1985.

Vol. III, State of Connecticut Public and Special Acts Jan. 1985 Reg. Sess., July 1985 Spec. Sess., p. 1386.

TYPES OF STATE PRIMARIES

According to the Book of the States (Council of State Governments, 1984), Table 9, 38 states have a "closed"

primary in which voters receive only the ballot of their party choice. Voters in these primaries must declare their party affiliation on or before the day of the primary election.

Nine states have an open primary in which voters receive a ballot for all parties and select the party of their choice in the voting booth.

Two states have a blanket primary in which voters are not restricted to one party but can vote for different offices among different parties. However, they may vote only once for each office.

Alabama by statute delegates to the parties who is eligible to vote in a primary, but requires party membership to participate.

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Does the First and Fourteenth Amendment right of political association preclude a state from seeking to restrict a state political party's constitutionally permissible attempt to expand voter participation in party primaries?

2. If a state may restrict a state political party's constitutionally permissible attempt to expand voter participation in party primaries, is the state statute at issue here supported by compelling state interests and narrowly drawn to serve such interests?

3. Is appellees' party rule expanding voter eligibility to participate in statewide party primaries subject to the qualifications provisions of Article I, § 2 and the Seventeenth Amendment to the United States Constitution, and, if so, does the party rule violate those provisions?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-766

JULIA H. TASHJIAN,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This appeal involves the effort by a minority party to expand its party membership and increase its popular support by allowing unaffiliated voters to participate in the party's candidate selection process. The district court and court of appeals held that the party's activity was protected by the First and Fourteenth Amendment right of freedom of association and could not be foreclosed by a state statute purporting to restrict the scope of permissible voter participation in state primaries. The State has appealed.

The plaintiff Party—the Republican Party of the State of Connecticut (the "Party")—is a political party consisting of individuals who associate themselves for the common advance-

ment of political beliefs and ideas. [J.S.App.* 245]. As stated in the Preamble to the Party Rules, the Party "encourages fullest voter participation in its activities and supports the broadest possible membership registration." [J.A. 46]. The Party "solicits the ideas, the interest and the participation of all segments" of the population. [J.S.A. 47]. The ultimate goal of the Party is to "seek out, designate, and secure the election of qualified candidates for public office at the Federal, State and Local levels of Government," who will implement Party policies, philosophies and programs. [J.S.App. 245, 246; J.A. 45-48].

Although, by law, the Republican Party is one of the two major political parties in Connecticut, *see* Conn. Gen. Stat. § 9-372(e), the Party has, for some time, had the status of a minority party in Connecticut politics. It has been substantially outnumbered in Connecticut, not only by registered Democrats but by unaffiliated voters as well. At the time this action was commenced, there were 659,268 registered Democrats, 532,723 unaffiliated voters and 425,695 registered Republicans in Connecticut. [J.S.App. 244]. As of October 1984, there were 718,772 registered Democrats, 608,613 unaffiliated voters and 477,749 registered Republicans. [J.S.App 20-21 n. 4, citing to *The Hartford Courant*, Jan. 4, 1985 at A6]. Thus, the enrolled members of the Republican Party constitute less than thirty percent of the registered voters in the State of Connecticut, and Connecticut Democrats have a greater than fifty percent membership advantage over Republicans.

Not surprisingly, in light of this statistical disparity, the Party has had limited electoral success in recent years in statewide elections for Governor, United States Senator and Representative. Since 1958, Repubicans have won only 4 of 16 statewide elections for Governor and United States Senator and only 25 of 84 of the elections for United States Representative.

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* "J.S.App." denotes references to the Appendix to appellant's Jurisdictional Statement; "J.A." denotes the parties' Joint Appendix; and App.Br. refers to Appellant's Brief.

[J.S.App. 20-21 n. 4, citing to *State of Connecticut Register and Manual* 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984)].

In August 1983, the Party's State Central Committee established a subcommittee to study the Party's existing rules and recommend ways in which the Party could improve its ability to win general elections and strengthen the two-party system in Connecticut. [J.S.App. 249, 103]. The subcommittee, consisting of members of the State Central Committee, representatives of town committees and past and present elected officials, met on three occasions in September 1983 and adopted a resolution calling for a revision of Party rules to allow unaffiliated voters to vote in Republican primaries. [J.S.App. 282, 284].

Based upon the subcommittee's study and recommendations, State Republican Chairman Thomas J. D'Amore, Jr. duly called and noticed a state party convention to consider, *inter alia*, "proposed changes to allow unaffiliated voters to vote in Republican Party candidate selection primaries." [J.S.App. 250].

On January 14, 1984, delegates to the state party convention approved an amendment (the "Rule") to the Party rules to allow unaffiliated voters to join enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. Specifically, the Rule provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

[J.S.App. 251-52].

The Rule does not allow members of other political parties, such as the Connecticut Democratic Party, to participate in Republican primaries. In addition, pursuant to Conn. Gen. Stat. § 9-59, an enrolled member of any party who renounces party membership is barred for six months from participating in another party's primary. Thus, any unaffiliated voter who has been previously enrolled in another party would be precluded from participating in Republican primaries for six months after leaving the other party.[1]

The Rule does not conflict with or affect the statutory requirements which must be met by Party candidates to qualify for placement on the primary ballot through the Party's convention system. The Party's nominating convention is still to be comprised solely of Party members, *see* Conn. Gen. Stat. § 9-372, and a candidate must receive twenty percent of the vote cast at the convention in order to force a primary. *See* Conn. Gen. Stat. § 9-400.

The Rule is, however, in direct conflict with § 9-431 of the Connecticut General Statutes ("the statute") which prohibits unaffiliated voters from voting in any party primary. The statute provides, in pertinent part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be. . . .

[App. 254].

In an attempt to avoid the conflict between the Party Rule and the statute, Republican legislators introduced legislation during the 1984 and 1985 sessions of the Connecticut General Assembly to amend the statute. The principal legislative proposal would have enabled the Republican Party to implement its Rule by amending the statute to provide:

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1. The validity of § 9-59 has not been challenged by appellees.

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district, as the case may be. . . .

[App. 255-56]. This proposed legislation is similar to the laws in effect in Alabama, Arkansas and South Carolina, which provide that a party shall establish the qualifications for participation in its party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code Ann. § 17-9-20.

During the course of state legislative hearings on the proposed legislation, the Director of appellant's Elections Division testified that this proposal was "workable." Specifically, he stated that:

> [T]he idea of [the proposal]—is workable. Including from an election administration point of view even having unaffiliated electors vote for some but not all offices on the primary ballot. That is workable from an election administration viewpoint provided we by regulations do such things as provide for the registrars to produce a list of unaffiliated voters to be checked off at the polls. . . .
>
> [We could also provide for] the clerks [to] print two versions of the absentee ballot and direct those respective versions to members of the party or unaffiliated electors as the case may be. And . . . lastly that there be two machines set up with two different ballot strips depending upon who is entering the machine . . . If an unaffiliated electors would enter [sic] those machines that have only the offices that they're entitled to vote for of that party and the regular rank and file of the party could vote for the broader number. . . .

[J.S.App. 257; J.A. 89-93].

The proposed legislation to allow implementation of plaintiffs' Rule was defeated in 1984 in committee and in both houses of the Connecticut legislature by the Democratic Party,

which then controlled both houses. [J.S.App. 23-29, 255-61]. The voting in each house followed strict party lines. [J.S.App. 258-59, 260-61]. The legislation was passed in 1985 by the presently-Republican controlled Connecticut legislature [App. Br. 49a-53a], but Democratic Governor William A. O'Neill vetoed the bill. [J.S.App. 28-29 n. 7; App.Br. 54a].[2]

In May 1984, after their first effort to enact legislation to implement their Rule had failed, appellees commenced this action challenging the constitutionality of § 9-431 as applied to the Party Rule and seeking preliminary and permanent injunctive relief. In addition to the plaintiff Republican Party, the individual plaintiffs are members of the Party, including the Party's chairman and principal federal elected officials. [J.S.App. 245-48].[3] The defendant Secretary of the State is charged by statute with the administration of the State's

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2. Appellant is technically correct that the court of appeals erred when it stated that § 9-431, which was originally passed in 1955, was "enacted" by a Democratic-controlled state legislature. App.Br. at 71. The statute was, however, plainly maintained in its present form by the Democratic legislature in 1984 and by the Democratic governor in 1985.

3. The plaintiff Republican Party was a defendant in *Nader* v. *Schaefer*, 417 F.Supp. 837 (D.Conn.) (three judge court), *aff'd. mem*, 429 U.S. 989 (1976), and in that litigation opposed the efforts of independent voters to participate in party primaries against Party wishes and in violation of then-existing Party rules. In *Nader*, the Republican Party asserted a First Amendment right to determine with whom it would associate in its candidate selection process. The Party asserts the same First Amendment right of association in this litigation on the basis of its present Party rules.

Plaintiff Weicker also participated in *Nader*, as an *amicus curiae*. In *Nader*, plaintiff Weicker argued for the right of unaffiliated voters to have a meaningful voice in party elections and unsuccessfully urged they be allowed to participate in Connecticut party primaries. Plaintiff Weicker asserts a consistent position in this litigation, now based on the amended Party rules authorizing such participation by independent voters in Republican primaries.

The suggestion of the appellant, and of the *amici* States, that either the Party or plaintiff Weicker is foreclosed by its or his position in *Nader* from the relief sought in this action is legally and factually without basis.

election and primary laws, including the challenged statute. [J.S.App. 248-49].

The parties agreed to consolidate a hearing on appellees' application for preliminary injunctive relief with trial on the merits and joined in filing a Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents. Appellees thereafter filed a motion for summary judgment and appellant filed a motion to dismiss. No other evidentiary materials were presented by the parties or relied upon in the parties' memoranda or argument in the district court.[4]

On December 5, 1984, the district court granted appellees' motion for summary judgment and denied appellant's motion to dismiss.[5] The court held that the statute imposed substantial

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4. In her brief to this Court, appellant has seen fit to cite deposition testimony and exhibits not presented to the district court or relied upon by either party in the district court proceedings. *See* App.Br. at 69-70, 69 n. 24. To this end, appellant filed a motion in the district court—after her Brief had been filed with this Court—seeking an order that certain depositions be filed with the district court for apparent use in the proceedings in this Court. The district court's Order in response to appellant's motion, Supp. Rec. Doc. 1, makes clear that no evidentiary materials other than the Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents were presented below and that the deposition materials and exhibits now proferred by appellant are not properly before this Court.

   Appellant has attempted, through the use of such extra-record materials, to impugn the motives of one of the individual plaintiffs, suggesting that he was motivated by "personal interests" as distinguished from those of the Party in supporting the Party rule. This suggestion, even if predicated on proper evidentiary materials, would be wholly unsupportable. There is no dispute in this case that the Party Rule was formally adopted by the entire Republican Party after initiation by the State Central Committee, study by a subcommittee of diverse Party members, and approval by delegates to the State Party convention. The procedures followed by the Party in enacting the amendment to its rules adhered to the requirements imposed by Connecticut statutes, as set forth by appellant's Director of Elections in a letter to counsel for the Party in August 1983. [J.S.App. 49-61].

5. Because appellant supplemented her motion with factual materials, the district court treated her motion to dismiss as one for summary judgment. *See* Rule 12(b)(6) of the Federal Rules of Civil Procedure.

burdens on appellees' right of association under the First and Fourteenth Amendments to the United States Constitution by allowing the State to "substitute its judgment for that of the party on . . . the question of who is and [who] is not sufficiently allied in interest with the party to warrant inclusion in the candidate selection process." [J.S.App. 185]. The court further held that appellant had not proved the existence of any compelling state interests necessary to sustain the statute or that the statute was narrowly drawn to serve the interests asserted by the State. The court therefore enjoined enforcement of the statute, as applied to the Republican Party Rule.

On August 8, 1985, the court of appeals affirmed, agreeing that the statute infringed on the Party's First Amendment right to identify who may participate in its candidate selection process and that the State had failed to prove any compelling interests or precise tailoring to justify the statutory infringement.

A notice of appeal to this Court was filed in the court of appeals on September 20, 1985, appellant's Jurisdictional Statement was filed on November 4, 1985, and probable jurisdiction was noted on January 13, 1986. On April 17, 1986, the court of appeals stayed its decision pending the outcome of this appeal.

SUMMARY OF THE ARGUMENT

I.

It is a fundamental tenet of our democratic system of government that minority groups have the right to seek new members and form coalitions with other individuals or groups in order to achieve a ruling majority. L. Tribe, *American Constitutional Law*, 774 (1978). As long as a political party does not act on the basis of constitutionally impermissible criteria, its determination of how and with whom it will form such associations is absolute. *Democratic Party of the United States* v. *Wisconsin*, 450 U.S. 107 (1981).

Section 9-431 of the Connecticut General Statutes, as applied to appellees' Party Rule, infringes the Party's First Amendment rights to determine its membership and to expand popular support for its policies and candidates. The statute also interferes with the rights of unaffiliated voters in Connecticut to exercise the right of political association with the Party now afforded them under the Party rules. Further, the statute infringes the rights of Party candidates to exercise their rights of personal advocacy under the First Amendment to solicit independent voter support in Party primaries and thereafter.

Appellees submit that a state may not, under any circumstances, *restrict* a political party's constitutionally permissible determination to *expand* voter participation in its processes. But even if the State has the power to restrict a minority party's right to expand its popular base, the power must be supported by compelling state interests and must be narrowly drawn. *William* v. *Rhodes*, 393 U.S. 23 (1968). The statute at issue here fails to meet this standard of constitutional scrutiny.

None of the interests identified by the State are compelling in the factual context of this case. No voter confusion will result from the inclusion of unaffiliated voters in the Republican Party primary process. Republican candidates will still be selected by party members at the state convention. Conn. Gen. Stat. § 9-372, *et. seq*. More fundamentally, the State has no legitimate interest in requiring a political party to maintain a preexisting ideology or constituency.

The Party Rule does not provide any additional opportunity for inter-party "raiding." The Party has only invited unaffiliated voters to participate in its primaries and does not allow registered Democrats to "cross-over" and vote in Republican primaries. Furthermore, because the Party has invited unaffiliated voters to participate in its candidate selection, no issue of "raiding" is presented by their involvement in Party primaries.

Appellant's factual contention that the Party Rule is administratively unfeasible was rejected by the lower courts and does not warrant this Court's reconsideration. *Branti* v.

Finkel, 445 U.S. 507, 512 n. 6 (1980). Indeed, the Director of appellant's Elections Division testified at state legislative hearings that the Party Rule is administratively feasible. [J.A. 89-93].

The Rule does not undermine the two party system. The State has not demonstrated that political chaos will result from the Party's inclusion of unaffiliated voters at its primaries. Open and modified open primaries are utilized in numerous states, and serve to increase voter participation in the electoral process. *See Rosario* v. *Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting). The State has offered no tenable explanation for why the Party's Rule will undermine the two party system in Connecticut.

II

The State's power to supervise primary elections under Article I, §§ 2 and 4 and the Tenth and Seventeenth Amendments is subject to the constitutional restrictions on the exercise of such authority imposed by the First Amendment. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). While the State may have the authority to insist on a primary process that is sufficiently representative to insure meaningful voter participation, the State may not, consistent with the First Amendment, exercise its power to restrict voter participation in a Party's fair and constitutionally permissible primary process.

III

The Party Rule does not violate the qualifications provisions of Article I, § 2 and the Seventeenth Amendment, which do not, in language or intent, apply to party primaries. Appellant's reliance on *United States* v. *Classic*, 313 U.S. 299 (1941), and *Smith* v. *Allwright*, 321 U.S. 649 (1944), for the proposition that a primary is an election under Article I, § 2 is misplaced. *Classic* holds that federal regulation of primaries is warranted in order to preserve the vitality of the Article I, § 2 right to vote at general elections; *Smith* holds that because

primaries are an integral part of a state's electoral system the conduct of political parties in a primary may constitute state action under the Fourteenth and Fifteenth Amendments. Neither case supports appellant's contention that a primary is an election subject to the Constitution's electoral prescriptions. In *Ray* v. *Blair*, 343 U.S. 214 (1952), this Court specifically rejected that contention.

Moreover, appellees' Party Rule is fully consistent with the language and intent of the qualifications provisions. These provisions were designed to insure that states do not restrict voter eligibility to participate in federal legislative elections beyond the eligibility requirements for statewide legislative elections. The Party Rule expands voter eligibility for federal legislative primaries.

ARGUMENT

I. CONNECTICUT GENERAL STATUTES SECTION 9-431, AS APPLIED TO THE PARTY RULE, UNCONSTITUTIONALLY INFRINGES APPELLEES' FIRST AND FOURTEENTH AMENDMENT RIGHTS OF POLITICAL ASSOCIATION.

This case involves a conflict between a state political party's decision to expand voter participation in its candidate selection process through coalition with other voters and a state statute prohibiting the proposed coalition. The right of a minority to form such associations lies at the core of our constitutional form of government. As Alexis de Tocqueville recognized over one hundred years ago:

> [T]he liberty of [political] association has become a necessary guarantee against the tyranny of the majority. In the United States, as soon as a party has become dominant, all public authority passes into its hands. . . . As the most distinguished members of the opposite party cannot surmount the barrier that excludes them from power, they must establish themselves outside of it. . . .

> The omnipotence of the majority appears to me to be . . . full of peril. . . . There are no countries in which associations are more needed to prevent the despotism of faction . . . then those which are democratically constituted.

1 A. de Tocqueville, *Democracy in America* 193-95 (H. Reeve ed. 1976).

The right of political association has long been afforded constitutional protection as a necessary concomitant of freedom of speech and belief. Writing for a unanimous Court in *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958), Justice Harlan stated that:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political [or other] matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Thus, "though freedom of belief is central, 'the First Amendment protects political association as well as political expression.' " *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right of association with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973), and "like free speech, lies at the foundation of a free society." *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960).

The protections afforded the right of association "reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the

core of our electoral process . . . ,' *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)." *Elrod* v. *Burns*, *supra* at 357.

In this case the State seeks to deny a state political party the right to expand voter participation in its candidate selection process. This Court has never before considered the constitutional conflict resulting from a state statute which *restricts* a *state* party's voter qualification rules.[6] *See* Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L. J. 117 (1984).

The Court has previously reviewed conflicts between a state statute regulating participation in candidate selection and *national* party rules. *See Cousins* v. *Wigoda*, 419 U.S. 477 (1975); *Democractic Party of United States* v. *Wisconsin*, 450 U.S. 107 (1981) ("*Democratic Party*"). The Court has also considered *individual voter* challenges to a state statute restricting participation in a party's candidate selection process. *Kusper* v. *Pontikes*, *supra*; *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *see Nader* v. *Schaeffer*, 417 F.Supp. 837 (D.Conn.) (three-judge court), *aff'd*, *mem*, 429 U.S. 989 (1976).[7]

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6. The Court has, of course, ruled that a state party's effort to exclude qualified voters from its candidate selection process is subject to Fourteenth and Fifteenth Amendment constraints. *See Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *cf.*, *Gray* v. *Sanders*, 372 U.S. 368 (1963); *see also Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244 (1984). This case, however, involves no issue of invidious discrimination or other denial of equal protection of the laws under the federal or Connecticut Constitutions.

7. In *Nader*, the constitutionality of § 9-431 was upheld against a challenge by unaffiliated voters who sought to participate in primaries against party wishes. In *Nader*, the court was concerned that the "primary election results reflect the will of party members," and in preserving "the associational rights of . . . party members." 417 F.Supp. at 846-47. Accordingly, the court refused to allow the "outsiders" into the party process.

This case, however, presents precisely the opposite situation to that posed in *Nader*. The Republican Party has determined that unaffiliated voters should be allowed to join in selecting candidates for certain offices. Thus, to ensure that "primary election results reflect the will of" Republican Party members, unaffiliated voters should be allowed

The Court has further considered government regulation of a state party's attempts to *restrict* voter participation in a primary process. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *see Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244 (1984).

Although the Court has never been confronted with a state's claim that it has the constitutional power to restrict a state party's attempt to *expand* voter participation in its candidate selection process, several guiding constitutional principles may be drawn from the related cases considered by the Court:

First, it is well established that a political party's decision about who may participate in its candidate selection process is fundamental and fully protected by the First and Fourteenth Amendment right of political association. *Kusper* v. *Pontikes*, *supra* at 58.

Second, while government has the power to regulate a state party's attempt to exclude qualified voters from the candidate selection process, *Terry* v. *Adams*, *supra*; *see Roberts* v. *United States Jaycees*, *supra*; it has limited or *no* power to restrict a state party's attempt to expand voter participation in the candidate selection process, as long as the party's efforts are otherwise constitutionally permissible. *Democratic Party*, *supra* at 123-24.

Third, any authority the state does have to regulate a state party's candidate selection process must be justified by compelling state interests and narrowly exercised to further such interests. *Roberts* v. *United States Jaycees*, *supra* at 3258.

Appellees submit that in this case the State of Connecticut has no authority to interfere in the Party's constitutionally permissible decision to expand voter participation in its primary process. Appellees further contend that the state statute

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to participate in party primaries. The prohibition imposed by § 9-431 constitutes an "interference with the associational rights of [the party and] its members" and is therefore unconstitutional. *Id.* at 845.

at issue is, as applied to the Party rule, unsupported by compelling state interests and not narrowly drawn to serve such interests. The statute interferes impermissibly and unnecessarily with appellees' First Amendment freedom of political association and was properly held to be unconstitutional as applied.

A. Absent Constitutionally Impermissible Criteria, A Political Party's Freedom to Expand Voter Eligibility to Participate in Its Candidate Selection Process is Absolute and Its Decisions Cannot Be Restricted By the State.

Appellees submit that, unless a political party relies upon constitutionally impermissible criteria, the State may not, under any circumstances, restrict the party's decision to expand voter participation in its candidate selection process.

While a compelling state interest test may apply to other forms of governmented intrusion into a party's First Amendment right of political association, *Democratic Party, supra*, including a party's attempt to narrow its membership, *see Terry* v. *Adams, supra*; *Smith* v. *Allwright, supra*; *Roberts* v. *United States Jaycees, supra*; the Court has never held that the state or federal government has the power to prohibit a political party from forming constitutionally permissible coalitions to expand its popular support.

A political party's freedom to enlarge its associational boundaries—either by adding new members or by forming coalitions with other parties or groups of voters—is an essential component of the democratic form of government. "Democracy envisions rule by successive temporary majorities." L. Tribe, *American Constitutional Law* 774 (1978) ("Tribe"). It is founded on the proposition that minority groups will grow and, as necessary, unite in the electoral system to form "new" majorities that ultimately will displace the ruling majority. *Id.*; F. Sorauf, *Political Parties in the American System* 2-6 (1964); Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. 636, 654 (1973).

The ruling majority—i.e., the State—is necessarily allowed to regulate the electoral system to insure a fair and orderly election process, including fair access to the candidate selection process for all members of the populace. *See, e.g., United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, *supra*. However, a political party's decision to seek new members or to ally itself with new groups or individuals, if constitutionally permissible, implicates no legitimate state concern and is not subject to state restriction. To the contrary, the First Amendment guarantees that the majority may not entrench itself by preventing the growth of competing parties. *Anderson* v. *Celebrezze*, 460 U.S. 780, 803 (1983) ("the powers of the state should not be invoked to assure monolithic control over political parties"); *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968).

A political party's freedom to associate "necessarily presupposes the [party's] freedom to identify the people who constitute the association." *Democratic Party*, *supra* at 122. Absent constitutionally invalid criteria, a political party's First Amendment right to choose its members and its requirements for participation in party affairs remain absolute. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible." *Id.* at 123 n. 25; *accord*, *Cousins* v. *Wigoda*, *supra*; *O'Brien* v. *Brown*, 409 U.S. 1, 4 n. 1 (1972);[8] *Rodriquez* v. *Popular Democratic Party*, 457 U.S. 1, 14 (1982); *cf.*, *Ripon*

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8. Appellees recognize that *Democratic Party*, *Cousins* and *O'Brien* were decided in the context of a conflict between state laws and national party rules about its presidential delegate selection process. *See Bellotti* v. *Connolly*, ____ U.S. ____, 103 S.Ct. 503 (1983) (Stevens, J., dissenting from dismissal of appeals). The quotations above from the Court's decision in *Democratic Party* were not, however, limited in words or by necessary implication to national political parties. As one leading commentator has observed, the Court's First Amendment analysis is equally applicable to the associational interests of state parties. *See Tribe*, at 787 ("the infringement of the associational rights of a party and its members [found in *Cousins*] would be substantially the same if the processes at stake were those of the state party rather than the national party").

Society, Inc. v. *National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975) (*en banc*).

Only when a political party seeks to exercise rights of association in violation of Fourteenth or Fifteenth Amendment commands is state regulation of party membership permissible. *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, *supra*; *cf.*, *Gray* v. *Sanders*, 372 U.S. 368 (1963); *see O'Brien* v. *Brown*, *supra* at 4 n. 1.

A party's freedom to choose with whom and how it will associate is nowhere more fundamental than in its candidate selection process. "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Kusper* v. *Pontikes*, *supra* at 58. A party's selection of its candidate is thus "an ultimate and crucial element of the party members' political activity." *Nader* v. *Schaffer*, 417 F. Supp. at 844; Note, *Freedom of Association and State Regulation of Delegate Selection*, 36 Vand. L. Rev. 105, 134 (1983); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1115 (1975). "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party*, *supra* at 122; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

As one commentator has thus stated:

> [The] right of a political party to determine its own membership by any standard it pleases is unimpaired as long as it does not abridge the right to vote free from racial, and probably sexual, discrimination.

Kester, *Constitutional Restrictions on Political Parties*, 60 Va.L.Rev. 735, 759-60 (1974); *accord*, *The Supreme Court, 1980 Term*, 95 Harv.L.Rev. 91, 244 (1981) ("If this freedom [of political association] is to have any content, a [party] must be able to determine who will participate in its decisionmaking process . . ."); Note, *The Right to Vote and Restrictions on*

Crossover Primaries, 40 Chi.L.Rev. at 659. ("The right of association should require these decisions [about eligibility to participate in party primaries] to be made by each party. The government is prohibited from impairing the organization of a group seeking to nominate a candidate.")

The Party's decision in this case to involve unaffiliated voters in its candidate selection process represents a determination by the Party that a coalition with the large bloc of Connecticut's independent voters offers an opportunity for the Party to achieve a ruling majority. The Party Rule thus reflects the Party's willingness to allow unaffiliated voters a voice in determining Party candidates and policy in an effort to induce independent voters to participate in Party affairs and support Party nominees. Such cultivation of broad, bi-partisan support is a principal goal—and essential function—of a political party in our democratic system:

> Inasmuch as parties in competitive systems seek to win the electoral support of groups that may not be particularly predisposed toward political participation, the parties serve to pull these groups into more active involvement in the polity and thus to integrate them into the political system and its processes.

R.E. Dawson, "Social Development, Party Competition, and Policy," in *The American Party System* 208-9 (1967); *see also* A. Ranney, *Curing the Mischiefs of Faction* 201 (1975).

The State—representative of the political party in power—may not, consistent with the democratic theory of government, seek to restrict such a coalition. It may be that independent voters, once induced to participate in Party affairs, will, in fact, decide to affiliate formally with the Party; it may be that such voters will retain their independent status, but support the Party's nominees nonetheless; or it may be that Party policy and direction will be affected, to an unknown degree, by independent voter involvement in selecting Party candidates. In any eventuality, the Party's First Amendment right of political association fully protects the Party's effort to obtain

unaffiliated voter support. The Party's alliance with independent voters involves no impermissible discrimination and may not be regulated by the State.

B. The Statutory Infringement of Appellees' First Amendment Rights is not Justified by Compelling State Interests or Narrowly Tailored to Serve Such Interests.

Appellees have argued above that their First Amendment right to associate with independent voters cannot be restricted by the State. Even if a state may interfere with a political party's constitutionally permissible decision to expand primary voter eligibility, the interference must, at the very least, be supported by compelling state interests, *Democratic Party, supra* at 124; *Williams* v. *Rhodes, supra* at 31; and be narrowly drawn to serve such interests. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). As the lower courts held, the statute substantially interferes with appellees' First Amendment rights and, as applied to the Party Rule, serves no compelling state interests and is not narrowly drawn.

1. The Statute Imposes a Substantial Burden on Appellees' First Amendment Rights of Political Association.

Appellees have previously discussed the fundamental right of a political party to select its candidates without state interference. In addition to infringing that basic function of a political party and its adherents, the statute impermissibly interferes with the First Amendment rights of the Party, its adherents and its candidates for office in other substantial respects.

a. The Statute Interferes with Appellees' Right to Encourage Unaffiliated Voter Participation at General Elections.

It is axiomatic that the ultimate goal of a political party is to shape the policies and programs of government through the election of its candidates. *Storer* v. *Brown*, 415 U.S. 724, 745 (1974). To win elections, a minority party must aggregate

various interests to create coalitions and attract bi-partisan support not only at primary elections, but, more important at the general elections. *See, e.g.*, F. Sorauf, *Political Parties in the American System* 2-6 (1964); Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. at 654. In particular, as a minority party in Connecticut, it is necessary for the Republican Party to enlist the support of Connecticut's 600,000 unaffiliated voters at Connecticut's general elections.

The Party Rule encourages independent voter support for Party candidates at general elections in several respects: first, by securing the unaffiliated voter's involvement for a particular candidate at the primary stage, the Party increases the likelihood that the voter will participate at the general election. A voter who participates in a primary is more likely to vote in the general election, *see* M.E. Jewell, *Voting Turnout in State Gubernatorial Primaries*, 30 W. Pol. Q. 236, 244 (1977). Furthermore, an independent voter who identifies with a party's "community of interest" or who participates in a primary in order to "associate with a party presenting 'candidates or issues more responsive to [his] immediate concerns,' " Comment, *The Constitutionality of Non-member Voting in Political Party Primary Elections*, 14 Willamette L. J. 259, 290 (1978), quoting *Rosario* v. *Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting), may reasonably be expected to support candidates previously supported in a primary. "A voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

Second, the involvement of some unaffiliated voters in Republican Party primaries can help ensure that the Party selects candidates with sufficient appeal to other like-minded independent voters to obtain their bi-partisan support at the general election. *Anderson* v. *Celebrezze*, *supra* at 788 ("a candidate serves as a rallying point for like-minded citizens"). As Justice Powell has noted, an open primary

> "allows relatively independent voters to cast their lot with the party that speaks to their present concerns. By attract-

> ing participation by relatively independent-minded voters, the [open primary] arguably may enlarge the support for a party at the general election."

Democratic Party, supra at 132-33 (Powell, J., dissenting).

Finally, unaffiliated voters who become interested and involved with particular Republican Party candidates may well be induced to support those candidates actively, by providing financial support and by participating in campaign activities in the general election. Such assistance in the general election campaign will help increase "the size of the audience reached," *Buckley* v. *Valeo*, 424 U.S. at 19, promoting greater discussion of issues and candidates and additional voter support.

Section 9-431 interferes with appellees' ability to induce unaffiliated voters to join and support them in the electoral process and thereby inhibits the Party's efforts to elect candidates on a bi-partisan basis. *See* Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi. L. Rev. at 644. Thus, the statute infringes appellees' First Amendment right to seek the support of unaffiliated voters—whose support they need to win the general elections.

b. The Statute Impermissibly Interferes With the Right of Qualified Voters to Participate in Party Affairs.

In addition to interfering with the First Amendment rights of the Party, the statute also violates the First Amendment rights of independent voters to exercise the freedom of association now afforded them by the Party.[9] The Party has granted the right to participate in its affairs to a bloc of new potential adherents, and those adherents have a First Amendment right to ally themselves with the Party. *Contrast Nader* v. *Schaeffer*,

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9. The Party has standing to assert the First Amendment rights of unaffiliated voters with whom it seeks to associate. *NAACP* v. *Button*, 371 U.S. 425, 428 (1963); *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958).

supra (unaffiliated voters *not* permitted to participate by political party).

The Court has consistently held that where the franchise exists, all qualified voters have a constitutionally protected right to vote. *Dunn* v. *Blumstein*, *supra*; *Kramer* v. *Union School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965). This right is fully applicable to voting in primary elections. *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Terry* v. *Adams*, *supra*; *United States* v. *Classic*, *supra*.

A state may not, by statute, deny a group of otherwise qualified voters the right to vote, absent a compelling state interest. "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' " *Dunn* v. *Blumstein*, *supra* at 337, quoting *Kramer* v. *Union School District*, *supra* at 627 (emphasis added in *Dunn*); *see Rosario* v. *Rockefeller*, *supra* at 763 (Powell, J., dissenting).

The Court has recognized a particular need to protect the associational rights of independent voters, since a law inhibiting independent voter participation in the electoral process is directed at "voters whose political preferences lie outside the existing political parties" and who may lack representation in state legislatures adequate to protect their rights. *Anderson* v. *Celebrezze*, *supra* at 793-94 & 793 n. 16; *Developments in the Law*: *Elections*, 88 Harv. L. Rev. at 1136 n. 87.

In this case, Connecticut's unaffiliated electors are qualified voters and meet the requirements established by the Party for voting in statewide Republican primaries. They are precluded from participating in such primaries by the statutory restriction contained in § 9-431. This restriction may only be upheld if supported by compelling state interests and if narrowly drawn to serve such compelling interests. *Id.*

c. The Statute Impermissibly Interferes with the Right of Party Candidates to Seek Unaffiliated Voter Support.

Appellees Weicker, McKinney and Johnson are, in addition to being members of the Republican Party, elected federal office-holders in Connecticut. Pursuant to the Party Rule they may seek the support of unaffiliated voters at Republican primaries, as well as in the general election. Section 9-431 interferes with appellees' rights, as candidates for office, to seek such support.

This Court has held that a "candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley* v. *Valeo*, *supra* at 52. In *Buckley*, the Court held unconstitutional the ceiling on personal expenditures by candidates established by the Federal Election Campaign Act of 1971, 18 U.S.C. § 608(a)(1). *Id.* at 52-53. While stressing the societal importance of unfettered debate of a candidate's qualifications and policies, *id.* at 14, the Court also took note that an expenditure by a candidate "directly facilitates his own political speech." *Id.* at 52 n. 58.

In the same vein, a candidate's right to appeal to a particular group of like-minded voters is a personal right of advocacy, fully protected under the First Amendment. *See id.* at 22; *Anderson* v. *Celebrezze*, *supra* at 787. Indeed, the right of a candidate to appeal to a diverse electorate implicates not only the candidate's First Amendment rights but the right of the voters as well to a meaningful choice among candidates. *Anderson* v. *Celebrezze*, *supra* at 787; *Bullock* v. *Carter*, *supra* at 143.

Because § 9-431 interferes with a candidate's right to seek unaffiliated voter support in accordance with his Party's rules, and correlatively impinges on unaffiliated voter access to like-minded candidates, the statute substantially violates appellees' First Amendment right of political association.

d. The First Amendment Infringement is Substantial.

Appellant contends that the statutory requirement of public party affiliation for participation in a party primary is trivial and that any purported infringement of appellees' right of association resulting from the statute is "de minimis." App. Br. at 62. Appellant further argues that appellees can appeal to Connecticut's unaffiliated voters in other ways outside the primary process.

Appellant misperceives the significance of the public affiliation requirement and its impact on the Party's effort to enlist the support of independent voters. Enrollment with a party constitutes a formal and public statement of a voter's personal belief. Independent voters, in Connecticut and elsewhere, have a commitment to their unaffiliated status which causes them to be unwilling to affiliate formally with a political party. The reasons for this unwillingness may be many: the voter may support one candidate but not all candidates proposed by a party; he may agree with some party policies but not the platform of the party as a whole; he may identify with the local party but not with the national party, national candidates or national policies.

In addition, public affiliation with the party may have serious social consequences for an elector. *See Elrod* v. *Burns*, 427 U.S. 347 (1976). A voter may hold a job or position in society in which it is important to remain politically neutral; the voter may be a government employee who, for perceived reasons of job security, does not want to identify with a particular party; the voter's business or social position may also make public affiliation undesirable. For whatever reason, the voter may fear the consequences of publicly disclosing membership in a political party. *See NAACP* v. *Alabama*, *supra*. Or, there may be no logical reasons at all for a voter's refusal to affiliate.

In Connecticut, over one third of the registered electorate has historically chosen to remain unaffiliated. Appellant's

argument that an affiliation requirement is "de minimis" trivializes a voter's decision to affiliate and ignores the long-standing history in Connecticut of a committed independent electorate.

The Party Rule recognizes that unaffiliated voters will often be unwilling to give up their independent status and that an affiliation requirement will act as a barrier to involving them in Party affairs. Thus, rather than requiring the independent voter to agree to a formal public affiliation with the Party, the Rule attempts to achieve a coalition between the Party and the independent voter(s). Both groups are allowed to retain their identity, but the candidates selected by the Party through its primary will reflect the combined interests and concerns of each. Whether, in the future, the unaffiliated voter decides to become a formal member of the Party, whether he expresses a private affiliation by participating in the Party primary and supporting Party candidates in future general elections, or whether his participation is limited to supporting a specific candidate in a specific primary, the end result is the same: a coalition—that is, an association betweeen the Party and the independent voter. That association will not occur if public affiliation is required for primary participation.

The Connecticut Democratic Party, which participated in this action as an *amicus* in the court of appeals and supported appellant's position, clearly recognized that appellees' Rule would have a significant competitive impact on the voting patterns and associations of unaffiliated voters. Thus, in its brief to the court of appeals, the Democratic Party admitted that it "must respond to [appellees' Rule]—like it or not—or run the risk of losing the support of unaffiliated voters in the general election." Dem. Party Amicus Br. at 4.

It is clear that the Party's present ability to appeal to unaffiliated voters, which appellant suggests is more than adequate to allow whatever association is desired, is inadequate. Despite the informal appeals for unaffiliated support suggested by appellant, the Republican Party has been unable

to obtain substantial unaffiliated support and has been unable to win statewide elections in Connecticut on a consistent basis for the past twenty-five years. Appellees are constitutionally entitled to attempt new and competitive ways of increasing support for their Party to replace old, unsuccessful ways. *Williams* v. *Rhodes*, *supra* at 32.

As the court of appeals observed, the Party can do nothing to overcome the barrier to their proposed association imposed by the statute. [J.S. App. 99 n. 24.] Unlike the situation in *Rosario* v. *Rockefeller*, *supra*, the Party can not preserve its associational rights by itself effectuating timely registration; unlike the situation in *Marchioro* v. *Chaney*, 442 U.S. 191 (1979), the burden on associational rights is caused solely by the statute and not by any party action. If the Party's attempt to form a coalition with unaffiliated voters constitutes protected First Amendment action—as it clearly does—the State's imposition of a barrier to the coalition which is beyond the power of the Party to surmount and which, on its face, is in conflict with the desire of one-third of Connecticut's electorate, cannot be deemed "de minimis."

2. The Constitutional Standard of Review.

State infringement upon the right of political association—like infringement upon freedom of speech—is subject to the "closest scrutiny." *NAACP* v. *Alabama*, *supra* at 460-61. This Court has, thus, repeatedly held that a state statute that imposes substantial burdens on a political party's right of political association is unconstitutional unless the State demonstrates a compelling state interest and employs precisely tailored means to avoid unnecessary abridgement of associational freedoms. *Roberts* v. *United States Jaycees*, *supra* at 3258; *Democratic Party*, *supra* at 124; *Buckley* v. *Valeo*, *supra* at 25; *Cousins* v. *Wigoda*, *supra* at 489; *Williams* v. *Rhodes*, *supra* at 1; *Tribe*, at 786; *Note*, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. at 124.

3. Appellant Has Failed to Demonstrate a Compelling Interest Justifying the State's Infringement of Appellees' Right of Political Association.

Nowhere in her Brief does appellant contend that the State's interests in the public affiliation requirement of § 9-431 are "compelling" or that the statute is narrowly drawn. Rather, appellant contends only that "the interests of the State are substantial," App. Br. at 52, and that the lower court erroneously applied a strict scrutiny analysis to the First Amendment issues presented. App. Br. at 48.

Appellees submit that the lower courts correctly subjected § 9-431 to strict constitutional scrutiny and, moreover, that the interests identified by the State do not support the First Amendment infringement of appellees' rights even under the lesser standard proposed by appellant.

Although appellant does not precisely delineate in her Brief to this Court the interests of the State she claims are "substantial," in her briefs in the lower courts she identified essentially four such interests: (1) preserving party identity and thus preventing voter confusion; (2) preventing inter-party raiding; (3) promoting orderly election administration; and (4) preserving a stable two-party system.

a. The Party Rule Does Not Undermine Party Identity or Promote Voter Confusion.

Appellant first argues that the statute is necessary to insure that the candidates selected at Party primaries will, in fact, represent the views of Party members. Appellant argues that the State has an interest in protecting voters from being misled about the ideologies of candidates associated with the Republican Party label. Appellees submit that no issue of "voter confusion" or "preserving party identity" is properly involved in this case.

The Party Rule does not in any way affect the requirements which must be met by Republican Party candidates for place-

ment on the primary ballot and, if successful in the primary, for the general election. A candidate must be a registered member of the Party and must receive twenty (20%) percent of the vote cast at the Party's nominating convention to qualify for placement on the ballot. Delegates to the convention are selected from and by Party members only. Conn. Gen. Stat. §§ 9-372, *et seq.*

Thus, the candidate offered to the public at the general election will be a registered Republican representing the choice of the members of the Republican Party. The involvement of unaffiliated voters in the party primary will only insure that the Republican candidate chosen will have the greatest likelihood of receiving the bi-partisan support necessary to win the general election.

More fundamentally, however, the State has no legitimate interest in requiring the Republican Party to maintain a given party ideology or constituency. There can be no distortion of the Party's philosophy from the inclusion of unaffiliated voters, where the Party has specifically sought their input. The two party system is not undermined by one party's expansion of its electoral base; and even if a party adopts a self-destructive course of action, the State has no right to interfere. *Democratic Party, supra* at 123-24. As the district court held, the concern that the Party Rule "will 'destabilize' the Republican Party is a matter for Republicans to consider; it is not an appropriate subject for state legislation." [J.S.App. 195].

Indeed, appellant's assertion of the need to preserve party labels is, itself, of doubtful validity. This Court has recently recognized that party labels often mean little:

> Major parties encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum.

Buckley v. *Valeo, supra* at 70.

Appellant's apparent belief that the Connecticut electorate will be unable to inform itself about the policies and goals of Republican Party candidates is also unsupportable. As this Court observed in rejecting a similar argument against allowing an independent party on the ballot in Ohio,

> "Today the vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates."

Anderson v. *Celebrezze*, *supra* at 797; *see also Dunn* v. *Blumstein*, *supra* at 358.

No legitimate, let alone compelling, state interest in avoiding voter confusion is served by § 9-431.

(b) There is No Threat of "Raiding"

In the lower courts, appellant contended that § 9-431 is necessary to deter "raiding." Although this argument is not specifically raised in appellant's Brief in this Court, *see* App. Br. at 52-62, appellant's discussion in a related section of her Brief, App. Br. at 65, of *Rosario* v. *Rockefeller*, *supra*, makes it unclear whether appellant has abandoned her claim that the Party Rule would engender raiding.

In any event, raiding is not a realistic problem in this case. "Raiding" is a practice in which "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario* v. *Rockefeller*, *supra* at 760.[10] The State's interest in

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10. The ability of a party or a group of people to organize an effective "raid" in an open primary, under any circumstances, has been severely questioned and is subject to great doubt. *See Openness, Participation and Party Building Reforms for a Stronger Democratic Party* 68 (1978) (Winograd Commission) ("the existence of 'raiding' has never been conclusively proven by survey research"); Note, *Developments in the Law: Elections*, 88 Harv. L. Rev. at 1173; Note, *The Constitutionality of Non-Member Voting in Political Primary Elections*, 14 Willamette L.J. at 282-86; *see generally*, Bickel, *Reform and Continuity* 63-64 (1971); A. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 21, 35-36 (1972).

preventing raiding can only arise if the Party Rule somehow allows voters hostile to the Republican Party to manipulate the outcome of Party primaries.

The Party Rule presents no opportunity for raiding not already existing under Connecticut election law. Although described by appellant as creating an "open" primary, in fact, the Party has invited only unaffiliated voters to join in its primaries. The Rule does not allow registered Democrats to "cross-over"—i.e., vote in a Republican party primary—while remaining members of the Democratic Party. Thus, the Rule supports no new concern that members of the Democratic party might be induced to "raid" Republican primaries: there is no greater chance, under the Party Rule, that a voter would leave the Democratic party and become unaffiliated in order to "raid" a Republican primary then, as now permitted under Connecticut law, he would leave the party and register as a Republican to sabotage its primary.

Moreover, Conn. Gen. Stat. § 9-59 provides that a voter enrolled in a party may not vote in another party's primary for a period of six months after leaving his original party. Thus, only if a registered Democrat is willing to renounce his party membership six months before a Republican primary—*i.e.*, before the Republican Party convention and before he even knows whether there will be a Party primary—can he participate in a Republican primary as an unaffiliated voter. Any Democrat so intent on raiding that he would follow that unlikely course could just as easily renounce his party membership and join the Republican Party and vote in *all* Republican primaries irrespective of the Party Rule.

Participation in Party primaries by unaffiliated voters (who have not left a party), of course, presents no spectre of raiding. Raiding, by definition, only applies to an invasion by unwelcome voters; here, the Republican party has expressly invited all unaffiliated voters in Connecticut to participate in the Party's statewide primaries. Whether Party policy or candidate selection is substantially affected, the Party has made its

choice of strategies in the political marketplace and is constitutionally entitled to reap the fruits—or famine—of its decision. "As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party, supra* at 124.[11]

(c) Appellees' Rule Does Not Interfere With Orderly Election Administration.

Appellant also contends that the Party Rule may seriously interfere with the State's ability to administer party primaries. This claim, which is factual in nature, was rejected, as unsupported by the evidence, in both lower courts. Appellant has not advanced any "most exceptional circumstances" which would warrant this Court's departure from its "settled practice" of declining to reconsider factual determinations in which the district court and court of appeals have concurred. *See Branti* v. *Finkel*, 445 U.S. 507, 512 n. 6 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978). Indeed, appellant cites no actual record evidence to support her claimed administrative burden. In fact, appellant produced no evidence below of undue cost, time or other practical obstacle to implementation of the Rule.

To the contrary, Albert P. Lenge, Director of appellant's Elections Division, testified in state legislative hearings that appellees' Rule was "workable from an election administration viewpoint." [J.A. 52]. In his testimony, Lenge explicitly addressed the purported problem now asserted by appellant concerning absentee ballots, testifying that a procedure for

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11. Even if the State could properly assert a compelling interest in preventing "raiding" by unaffiliated voters, the Party Rule does not alter the existing opportunity of independent voters to disrupt a party's primary process in Connecticut. Pursuant to the Democratic legislature's enactment of Public Act 84-118, any unaffiliated voter in Connecticut may enroll in a party until noon of the day before a primary and participate in the party's primary election. As the lower courts observed, the State's enactment of P.A. § 84-118 belies any concern with raiding by unaffiliated voters. [J.S.App. 116, 188-89].

preparation and distribution of such ballots could be implemented without problem. [J.A. 52]. Also easily resolvable, according to Lenge, was appellant's now expressed concern for monitoring unaffiliated voter participation in only one primary:

> That is workable from an election administration viewpoint provided we by regulations do such things as provide for the registrars to produce a list of unaffiliated voters to be checked off at the polls. . . . [S]omeone so checked [could not then] vote in the other party's primary if the other party also decides to open it up to unaffiliated voters. . . .

[J.A. 52].

Clearly, any fears which appellant might have concerning the implementation of the Party Rule are "no more than 'theoretically imaginable'. No such remote danger can justify the . . . crippling impact on the basic constitutional rights involved in this case." *Williams* v. *Rhodes*, *supra* at 33; *see also Democratic Party of the United States* v. *Wisconsin*, *supra* at 125-26.[12]

d. The Party Rule Does Not Undermine the Two-Party System.

Appellant contends, at great length, that the closed primary system mandated by § 9-431 is necessary to preserve Connecticut's two-party system. Appellant argues that the Republican Party will be severely weakened, the power of its leaders eroded and the Party faithful betrayed if unaffiliated voters are allowed to participate in Party primaries. Appellant predicts the demise of the Party and the two-party system in Connecticut as a result.

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12. There is not even evidence that the State would be required to purchase additional voting machines as opposed to simply reprogramming existing machines and providing an exterior switch to differentiate the applicable unaffiliated or Party member ballot.

Appellant's purported desire to save the Republican Party might be legitimate if the open primary concept were being imposed on the Party contrary to its wishes. Here, however, the Party has affirmatively chosen to open its primary process to independent voters. The Party's decision was reached after extensive study of ways to improve Party electoral success by a Party subcommittee and after approval by Party delegates to a state party convention.

As previously discussed, a political party has a fundamental First Amendment right to make precisely such decisions, even if—as appellant contends—the party's judgments are likely to be wrong and the party weakened as a result. *Democratic Party, supra* at 123-24. Indeed, the growth and demise of various parties throughout this nation's history reflects precisely such freedom to make wise or unwise decisions about policies and future courses of action. As Professor Emerson has written:

> The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction.

T. Emerson, *The System of Freedom of Expression*, 47 (1970). Quite simply, if appellant is correct that a primary system open to unaffiliated voters will destroy the Republican Party, social ch nge will occur and a new party will inevitably replace the old

Moreover, the history of open or modified open primaries in this country plainly reveals that the two-party system is not destroyed by such a process. Open primaries, similar in concept to the Party Rule, were first advocated at the beginning of this century. The purpose of opening primaries to all voters was "to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process." *LaFollette* v. *Democratic Party of the United States*, 93 Wis. 2d 473, 287 N.W.2d 519, 536 (1980), *rev'd*, 450 U.S. 107 (1981). They were adopted as a result of "the state's

interest in protecting the primacy of the individual voter over political machines, bosses and parties." Note, *State Intrusions Upon the Associational Freedoms of Political Parties*, 1983 Wis. L. Rev. 211, 214; S. Schier, *The Rules and the Game* 37 (1980).

As a result, nine states have adopted pure open primary procedures whereby any registered voter is allowed to vote in a party primary, regardless of whether he is enrolled in that party.[13] Three states allow registered voters to participate in all party primaries for public office.[14] In addition, seventeen states allow a previously unaffiliated voter to participate in a party primary provided he "affiliates" with the party at the time of, and for the purpose of, voting in the primary.[15] Only twenty-one states, including Connecticut, require a voter to be registered with a party prior to participation in the party's primary.[16]

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13. Hawaii Rev. Stat. § 12-31; Idaho Code §§ 34-402, 34-404, 34-904; Mich. Comp. Laws §§ 168.575, 168.576; Minn. Stat. § 204D.08(4); Mont. Code Ann. § 13-10-301(2); N.D. Cent. Code § 16.1-11-22; Utah Laws § 20-3-19(2); Vt. Stat. Ann. Tit. 17 § 2363; Wisc. Stat. §§ 5.37, 6.80(e).

14. Alaska Stat. §§ 15.05.010, 15.25.090; La. Rev. Stat. §§ 18:401B, 18:521B; Wash. Laws § 29.18.200.

15. *See generally* M. Jewell & D. Olson, *American State Political Parties and Elections* 107-11 (1982); Ala. Code § 17-16-14(b); Ark. Stat. Ann. § 3-126; Ga. Code §§ 34-624, 34-626; Ill. Ann. Stat. Ch. 46 § 7-44; Ind. Code Ann. §§ 3-1-9-3, 3-1-9-10 (Burns); Iowa Acts §§ 43.41, 43.42; Mass. Gen Laws Ann. Ch. 53 § 37; Miss. Code Ann. § 23-1-81; Mo. Laws § 115.397; N.H. Rev. Stat. Ann. § 654.34II; N.J. Rev. Stat § 19:23-45; Ohio Rev. Code Ann. § 3513.19; R.I. Gen. Laws § 17-9-26(c); S.C. Code Ann. §§ 7-5-120, 7-9-20; Tenn. Code Ann. § 2-7-115(b)(2); Tex. Stat. Arts. 5.02, 13.01a(4); Va. Code § 24.1-182.

16. Ariz. Rev. Stat. Ann. §§ 16-123, 16-152; Cal. Elec. Code § 501; Colo. Rev. Stat. § 1-2-203; Conn. Gen. Stat. § 9-431; Del. Code Ann. § 15-1302; Fla. Stat. § 101.021; Kan. Stat. Ann § 25-3301; Ky. Rev. Stat. §§ 116.045, 116-055; Me. Rev. Stat. Ann. Tit. 21 §§ 131 *et seq.*; Md. Elec. Code Ann. §§ 3-8 *et seq.*; Neb. Rev. Stat. § 32-530; Nev. Rev. Stat. § 293.287; N.M. Stat. Ann. § 1-4-16; N.Y. Elec. Law § 1-104.9; N.C. Gen. Stat. § 163.74; Okla. Stat. Tit. 26 § 1-104; Or. Rev. Stat. § 247.201; Pa. Stat. Ann. Tit. 25 § 2832; S.D. Codified Laws Ann. § 12-4-15; W. Va. Code § 3-1-35; Wyo. Stat. § 22-5-212.

Moreover, three states allow the party to determine voter eligibility in party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code. Ann. § 17-9-20.

In none of these states has the two party system been destroyed as a result of the open or modified open primary process. It is through the inclusion of voters in the electoral process—not exclusion—that factionalism and its evils are avoided. *See* R. E. Dawson, "Social Development, Party Competition, and Policy," in *The American Party System* 208-09 (1967).

The constitutional issue posed by this case is not whether political scientists or politicians disagree over what form of primary is best; clearly, they do. Rather, the issue is whether the State has a compelling interest in mandating that a party adhere to a given process for selection of its candidates, contrary to the party's constitutionally permissible determination. Saving the Republican Party from itself is plainly not such an interest.

4. Even if the State Has a Compelling Interest, the Statute Fails to Employ the Least Restrictive Means.

Where a state infringes the right of political association, "a heavy burden of justification is on the state" to show that the statute is finely drawn to serve the state's asserted interest *and* does not unnecessarily burden constitutionally protected activity. *Dunn* v. *Blumstein*, *supra* at 343; *Kusper* v. *Pontikes*, *supra* at 58-59. If a less burdensome method of achieving its interest is available, a "state may not choose the way of greater interference." *Dunn* v. *Blumstein*, *supra* at 343.

While appellees submit that none of the interests asserted by appellant are sufficient to uphold the statute as applied to the Party Rule, even assuming that any of the interests asserted by the State are "compelling" or "substantial," § 9-431 is plainly not the least restrictive means available for promoting such interests.

If the State is truly concerned about "raiding," it can increase the statutory period a voter must wait after leaving one party before participating in another party's primary or establish an additional waiting period after participation in a primary before a voter is eligible to vote in another party's primary. Similarly, the State can increase the statutory period an unaffiliated voter must wait before being eligible to participate in a party primary.

If the State sincerely fears administrative difficulties in implementing the Party Rule, it can require the Party to enact its rules sufficiently in advance of a primary to provide adequate time for administrative implementation.[17] It might further require the Party to establish that its proposed Rule is administratively feasible.

If the State feels that voter education is necessary, it is free to issue non-partisan descriptions of the primary laws and voter eligibility requirements to eliminate any perceived voter confusion.

Finally, the State has not justified its demand for *formal* and *public* party affiliation as a prerequisite for primary participation. The State could provide for a temporary and non-disclosable affiliation for purposes of the primary only, as many other states do. *See* n. 15, *supra*. Such "affiliation" could occur on the day of the primary and would satisfy any interest the State might conceivably have in insuring the integrity of the election.

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17. In fact, the Party followed the precise procedures set forth by appellant's Director of Elections, in conformance with applicable Connecticut laws for modifying party rules. [*See* J.S.App. 49-61].

II. SECTION 9-431, AS APPLIED TO THE PARTY RULE, IS NOT A PROPER EXERCISE OF THE STATE'S CONSTITUTIONAL AUTHORITY UNDER ARTICLE I, §§ 2 AND 4, OR THE TENTH OR SEVENTEENTH AMENDMENTS.

Appellant maintains that the states have the constitutional power under Article 1, §§ 2 and 4 and the Tenth and Seventeenth Amendments to determine who may participate in party primaries. This Court has repeatedly held, however, that the states' constitutional authority to supervise elections and establish qualifications for voters may not be exercised in violation of First Amendment protections. *Anderson* v. *Celebrezze*, *supra* at 794 n. 18; *Kusper* v. *Pontikes*, *supra* at 57; *Williams* v. *Rhodes*, *supra* at 29.

As the Court stated in *Kusper*:

> [A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections.
>
> . . . .
>
> [Thus] unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.

414 U.S. at 57.

Appellees recognize that this Court's decisions in *Democratic Party*, *supra*, and *Cousins* v. *Wigoda*, *supra*, which affirmed a party's fundamental right under the First Amendment to establish its own candidate selection process, involved a national party's rules for presidential delegate selection, and that different considerations may apply to state involvement in a state party's primary. Statewide elections do not necessarily involve the extra-territorial party interests identified in *Democratic Party* and *Cousins*, nor is there the danger that different

states will impose conflicting regulations on a state party's process. In addition, a state's interest under Article I, § 2 and 4 and the Seventeenth Amendment in supervising wholly internal elections is more direct than its responsibility over national presidential elections.

But a political party's fundamental interests in determining its membership, determining who may participate in candidate selection, modifying party policy and expanding popular support through coalitions with other groups or individuals, and improving its chances for winning elections are not affected by the national or state character of the party or the election. "Since the infringement of the associational rights of a party and its members would be substantially the same if the processes at stake were those of the state party rather than the national party . . . strict scrutiny . . . should be extended to cover all instances of interference by law in internal party processes." *Tribe* at 787.

The State's constitutional power to conduct and supervise primary elections thus does not, of itself, confer authority to restrict a party from determining who should participate in its primary. *See Democratic Party, supra*; *Cousins* v. *Wigoda, supra*; *O'Brien* v. *Brown, supra*. The State's interest is in the fairness of the primary, and as long as a party does not impermissibly *exclude* qualified voters, *see Terry* v. *Adams, supra*, or manipulate participation in the primary in order to dilute the weight given to party voters in violation of the Fourteenth or Fifteenth Amendments, *see Gray* v. *Sanders, supra*, the Party's requirements for participation in the Party primary are of no legitimate concern to the State. *Democratic Party, supra* at 124 n. 27.

It may be that a state may establish minimum voter participation requirements in its state primaries *greater* than those adopted by a state party. Such authority, if it exists, would derive from the state's interest in utilizing its primaries to insure a fully "representative" nominating process. Thus, for example, Wisconsin's long-standing tradition of unrestricted

voter participation in its open primaries *might* be found to override a state party's more restrictive delineation of voter eligibility. *But see* Kester, *Constitutional Restrictions on Political Parties*, 60 Va.L.Rev. at 759-60; *The Supreme Court, 1980 Term*, 95 Harv.L.Rev. at 244; Note, *The Right to Vote and Restrictions on Crossover Primaries*, 40 Chi.L.Rev. at 659. The Court need not, however, resolve here that issue, since in this case the State is not seeking to expand the primary voter base to insure a more representative character, but rather argues it may *narrow* voter participation in contravention of a political party's rules.

Appellant's argument, joined in by the *amici* States, that the court of appeals' decision in this case puts other state election laws in jeopardy fails to recognize this crucial distinction. State laws directed to the conduct of a primary which are necessary to insure the fairness and representative character of the process clearly may serve compelling state interests and may override a party's competing First Amendment rights. *See, e.g., American Party of Texas* v. *White*, 415 U.S. 767 (1974). Where, however, a party adopts procedures expanding voter participation in a fair and constitutionally permissible primary process, a state's interest in the conduct of its elections is satisfied and the First Amendment rights of the party prevail.[18]

Finally, the fact that the Party is exercising its association rights in the context of a state-financed primary does not alter

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18. This case thus presents a balance of the competing constitutional interests of the Party and the State different than that involved in *Langone* v. *Secretary of the Commonwealth*, 388 Mass. 185, 446 N.E.2d 43 (1983). In *Langone*, a state party rule limited a party member's statutory right to force a primary to candidates receiving fifteen percent of the convention vote, thus narrowing the state's determination of the requirements for a fully representative process. Under the analysis above, such a rule would yield to the state's compelling right to provide a representative primary system. The party rule at issue in *Langone* was upheld by the Massachusetts Supreme Court because it reasonably furthered the statutory primary system. *Id.* at 48.

the constitutional analysis. As this Court stated in *Bullock* v. *Carter*, 405 U.S. at 148-49:

> Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.

III. NEITHER ARTICLE I, SECTION 2, NOR THE SEVENTEENTH AMENDMENT BARS THE RULE ADOPTED BY APPELLEES.

Appellant further contends that the Party's Rule is unconstitutional under Article I, § 2 and the Seventeenth Amendment to the United States Constitution because it establishes different qualifications for voting in Republican primaries for federal and state representatives. Appellant argues that these constitutional provisions require absolute symmetry in voter eligibility for state and federal legislative primaries. Appellees submit that the provisions of Article I, § 2 and the Seventeenth Amendment relied upon by appellant are neither applicable to the Party Rule nor violated by its terms.

Article I, § 2 of the Constitution provides that:

> The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.[19]

There are thus two elements to this constitutional provision: the first—setting forth the method for electing congressional representatives—provides that the American people shall have the right to choose their federal representatives; the second—the qualifications provision—ensures that no voters eligible to vote in state legislative elections will be precluded from voting in federal congressional elections.

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19. The Seventeenth Amendment contains nearly identical language concerning the qualifications of electors for United States Senator.

Appellant's claim that the Party Rule violates the qualifications provision is based on the following line of reasoning: (1) the "right to choose" established in the first part of Article I, § 2 has been interpreted to protect the right to vote at primary elections; (2) the qualifications provision is thus applicable to primary elections; and (3) the qualifications provision precludes a party from expanding voter eligibility for federal legislative primaries beyond the voter eligibility requirements applicable to state legislative primaries.

While appellant's first contention is correct, *see United States* v. *Classic*, *supra*, her remaining two propositions are unsupportable.

A. The Qualifications Provisions Do Not Apply to Primary Elections.

Appellant contends that the word "Electors" in the qualifications provision of Article I, § 2 applies to primary voters. Appellant's argument is based on this Court's reliance on Article I, § 2 in *United States* v. *Classic*, *supra*, and *Smith* v. *Allwright*, *supra*, to protect the right to vote at federal elections. Appellant misunderstands the Court's reliance on Article I, § 2 in these opinions.

In *Classic*, Louisiana state election officials accused of altering and falsely counting ballots cast in a congressional primary were prosecuted by the Government under a federal statute prohibiting interference with federal constitutional rights. The district court dismissed the indictment on the ground that the defendants' conduct at the primary violated no federal constitutional right, and the Government appealed. The Court was thus required to decide if fraud at a congressional primary violated any right under the Constitution.

The Court held that the language "chosen . . . by the people" in the first part of Article I, § 2 created for qualified voters a secured constitutional "right to choose" their representatives, a right that included the right to "cast their ballots and to have them counted at congressional elections." *Id.* at

314-15. The Court held that a Louisiana congressional primary was such "an integral part of the election procedure," *id.* at 318, that fraud at the primary could render meaningless the voter's subsequent exercise of his right to choose at the general election. This was especially true in *Classic*, where a one-party electoral system in Louisiana virtually assured the primary winner success in the general election. *Id.* at 319. The Court thus asserted federal control over the state primary, through Article I, § 2, in order to insure that the right to vote at the general election was not deprived of meaning. *Id.* at 323-324. *Classic* did not hold, however, that a primary was an "election" subject to all of the Constitution's electoral prescriptions.[20]

The Court's recognition in *Classic* that a party primary is an integral part of a state's electoral scheme provided the basis for the holding in *Smith* v. *Allwright*, *supra*, that a state's delegation to a political party of the power to establish voter qualifications at a primary constitutes delegation of a state function. The party's exclusion of blacks from a Texas party primary was, thus, state action subject to the constraints of the Fifteenth Amendment. *Id.* at 661-62.

Neither *Classic* nor *Smith* support appellant's contention that primaries are "elections" subject to the constraints of Article I, § 2 and other provisions of the Constitution. Rather, *Classic* upholds the regulation of primaries under Article I, § 2 in order to insure that the right to vote at congressional elections remains meaningful, and *Smith* recognizes that because primaries are an integral part of a state's electoral scheme, the action of political parties in the primary can constitute state action subject to the Fourteenth and Fifteenth Amendments.

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20. It is important to note that the *Classic* Court applied only the first part of Article 1, Section 2—which "secure[s] to the people the right to choose representatives by . . . some form of election." *Id.* at 318, *see also id.* at 332 (Douglas, J., dissenting). The Supreme Court did not apply the qualifications provision of the Article to the primary, as the case did not involve the right of a party to determine its membership. *See Smith* v. *Allwright*, *supra* at 669 (Roberts, J., dissenting).

Appellant's argument that *Classic* and *Allwright* establish that party primaries are subject to the constitutional requirements applicable to general elections was expressly rejected in *Ray* v. *Blair*, 343 U.S. 214 (1952). In *Ray*, a candidate in a party primary for presidential elector challenged a state party's rule requiring him to pledge support for the national party's ultimate presidential nominee. The candidate contended, *inter alia*, that such a pledge violated the constitutional freedom of a presidential elector under Article II, § 1, which he claimed was applicable to primary candidates for presidential elector under *Classic* and *Allwright*.

The Court specifically rejected the argument that *Classic* and *Allwright* established that party primaries were subject to each of the constitutional provisions pertaining to elections:

> The fact that the primary is a part of the election machinery is immaterial. . . . It was the violation of a secured right that brought about the *Classic* and *Allwright* decisions. Here, they do not apply unless there was a violation of the Twelfth Amendment. . . .

Id. at 227.

The Court emphasized that a party primary is not required to conform to each election provision of the Constitution:

> . . . [E]ven if such [loyalty] promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. 2, § 1, . . . *it would not follow that the requirement of a pledge in the primary is unconstitutional.*

Id. at 230 (emphasis added).

Appellant's contention that the qualifications provision applies to voter eligiblity in primary elections is thus not supported by the cases upon which she relies. Equally important, there is no evidence that the founding fathers—when they adopted Article I, § 2—or Congress—when it ratified the

Seventeenth Amendment—intended the provisions to apply to party primaries. The founding fathers clearly did not anticipate that Article I, § 2 would apply to primaries, as neither political parties nor primaries then existed. *Ray* v. *Blair, supra* at 224 n. 11; *Newberry* v. *United States*, 256 U.S. 232, 250 (1921); *see generally* Note, *Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come*, 59 Corn. L. Rev. 107, 113-115 (1973).

Although the Seventeenth Amendment was ratified after many states had enacted primary systems, the Congress utilized no language indicating the Amendment would cover such primaries. In fact, it is likely that Congress believed that it would not apply. *See* 47 Cong. Rec. 223 (1911) (statement of Rep. Lenroot) ("this amendment . . . will be of little value, because special interests will nominate in both political parties the candidates for the United States Senate, and the people will be compelled to choose between the two . . ."). When Congress wanted to subject party primaries to constitutional protection, it specifically did so. *See* U.S. Const., amend. XXIV, § 1 (the "right of citizens . . . to vote in any *primary* or other election . . ."). Indeed, since prior to *Classic* and the White Primary Cases, party primaries were considered private activities not subject to federal regulation, *see Newberry* v. *United States*, *supra* at 250, it is unlikely that Congress would have intended the Seventeenth Amendment to apply to party primaries without substantial debate.

Moreover, as the court of appeals observed, application of the qualifications provision to party primaries could produce incongruous results. [J.S.App. 59-60]. There is, for example, no constitutional requirement that a state adopt the same nominating procedures for state and federal elections; thus, a state's electoral scheme may completely exclude the use of primaries for state office while providing primaries for federal office. If appellant's interpretation of the qualifications provision is correct, a federal office primary under such circumstances would be precluded, as there would be no eligible pool

of voters from a state office primary qualified to vote in the federal primary.

Appellant's attempt to subject party primaries to the qualifications provisions of Article I, § 2 and the Seventeenth Amendment is thus unsupported by the language of the provisions or by applicable case law, historical circumstances or logic. The court of appeals properly held that the qualifications provisions of Article I, § 2 and the Seventeenth Amendment do not apply to state party primaries.

B. The Party Rule is Consistent With the Qualifications Provisions.

Even if the qualifications provisions do apply to party primaries, the Party Rule is consistent with the language and intent of the provisions and is not constitutionally invalid. The history of the provisions makes clear that they were not intended to limit participation in congressional electives—as appellant contended—but rather to *prevent* restriction of the franchise in congressional elections.

Although, the first part of Article 1, § 2—the right of the people to choose the members of the House of Representatives—was universally accepted by the delegates to the Constitutional Convention,[21] the qualifications provision was the subject of great controversy. The Framers recognized that the "definition of the right of suffrage . . . [was] a fundamental article of a republican government." I Story, *Commentaries on the Constitution of the United States* § 583 at 405. Adoption of a uniform national standard for federal voting was, however, impossible. If the standard of one state had been endorsed, those states with different rules would have objected. Similarly, an entirely new federal standard would likely have disenfranchised (in federal elections) some voters who were eligible to

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21. The framers "held . . . in the highest reverence and respect" the principle that the "most numerous branch should have an immediate dependence upon . . . the people." I Story, *Commentaries on the Constitution of the United States* § 573 at 395 (2d ed. 1851).

vote in state elections, thus undermining popular support for the Constitution. *Id.* at §§ 583-84, pp.405-7; D. Hutchison, *The Foundations of the Constitution* 31 (1928).

As James Wilson of Pennsylvania stated:

> It would be very hard & disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the Natl. Legislature.

II *The Records of the Federal Convention of 1787* 201 (M. Farrand ed.)[22]

The founding fathers were also concerned that if definition of the right of suffrage was left soley to the states, discrimination against federalism would lead states to exclude voters from congressional elections, thereby "render[ing] too dependent on the State Governments, that branch of Federal Government, which ought to be dependent on the people alone." *The Federalist* No. 52, at 354 (J. Madison) (J. Cooke ed. 1961); *see also The Federalist* No. 57, at 385 (J. Madison).

In creating a national standard for suffrage, the Framers were thus confronted with two problems: first, the need to reaffirm the right of the individual states to establish federal voting standards, and second, the need to guard against efforts by the states to undermine popular support for the House of Representatives through restrictions on voter eligibility in federal representative elections. The language of the "qualifications provisions" in Article 1, Section 2 (later repeated in the Seventeenth Amendment) was adopted as a compromise by the Framers in light of these competing concerns. It allowed the

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22. Other delegates expressed similar sentiments. Oliver Elseworth of Connecticut warned the Convention that "people will not readily subscribe to the Natl. Constitution, if it should subject them to be disfranchised." II *The Records of the Federal Convention of 1787* at 201. Benjamin Franklin and John Rutledge of South Carolina also spoke against the problem of "narrowing" or "restraining" the right of suffrage. *Id.* at 205; *see also* I Story, *Commentaries on the Constitution of the United States* § 586, at 409.

states to maintain their own voter qualifications for federal elections, while at the same time insuring that the states could not utilize more restrictive voter qualifications for federal representatives than applicable in state legislative elections. *See* I Story, *Commentaries on the Constitution of the United States* §§ 583-84, pp. 405-07 (2d ed. 1851); D. Hutchinson, *The Foundations of the Constitution* 31 (1928); *The Federalist* No. 52, at 354 (J. Madison).

Appellees' Rule is fully consistent with the language and intent of the qualifications provision. Any elector qualified to vote in a Republican Party primary for state repreentative is also eligibile to vote in the congressional primaries. No voter qualified in the state office primaries is excluded from the congressional primaries; to the contrary, the Rule operates to include additional voters in such primaries. As the district court stated after reviewing the history and purpose of the qualifications provision, "Neither the language nor the history of Article I, Section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections." [J.S.App. 168].

The State cites no authority for its claim that absolute symmetry of voter eligibility in state and federal office primaries is required, nor has it attempted to dispute the history or intent of the qualifications provision set forth by appellees.[23] As Judge Oakes, concurring below [J.S.App. 133-34], stated:

> All that article I, section 2 means, it seems to me, is that anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote for Congress and the Seventeenth Amendment applies the same rule to the selection of senators.

The Party Rule fully complies with that requirement.

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23. The Seventeenth Amendment was also clearly intended to open the political process to more people. *See, e.g.*, H.R. Rep. No. 2, 62d Cong., 1st Sess. (1911); 47 Cong. Rec. 231 (1911) (statement of Rep. Norris) (amendment "is a step toward placing the real government in the hands of the people themselves").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 85-766

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON AND THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S REPLY BRIEF

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In the Supreme Court of the United States

October Term, 1985

No. 85-766

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S REPLY BRIEF

INTRODUCTION AND SUMMARY

The sole issue in this case is the right of the States to regulate voter qualifications in a state primary election. Appellees at first argue that the States have no such right, claiming that a major party may " 'determine its own membership by any standard it pleases.' " Br., p. 17. [1/]

Appellees then concede, however, that the States may regulate primary voter eligibility and may at least require enrollment on primary day. Br., p. 36. They also acknowledge that the States may expand voter participation beyond that permitted by a party, contending that a state-mandated closed primary is unconstitutional, while a state-mandated open primary is not. Br., pp. 38-39.

1/ Abbreviations refer to the following: Br., Appellees' brief; Appellant's br., our brief on the merits previously filed; J.S. App., Appendix to Jurisdictional Statement; J.A., Joint Appendix; Add., addendum to this brief.

These inconsistencies reflect the basic fallacies of their argument. Appellees' contrived distinctions, furthermore, reflect a fundamental misunderstanding of the Constitutionally ordained role of the States, as well as Congress, in election regulation. Each State may select the primary system which in its judgment best serves a free and representative government. That judgment, while not absolute, is entitled to respect under the Constitution.

Connecticut, furthermore, has very liberal party affiliation requirements. One may vote in a primary simply by joining a party up to the day before the election. No loyalty oath or fee is required and one may disaffiliate at any time. This is in marked contrast to the serious administrative burden on election officials caused by the conflicting voter qualifications of appellees' "rule".

This is not a case involving unfair, oppressive or discriminatory election burdens. This case concerns a

demand by a political party to rewrite the election laws as it absolutely pleases. If this Court adopts this logic, then the federal judiciary will be mired down with suits based on endless jockeying for narrow partisan advantage. Federal judges will become election commissioners. Moreover, the States and the public will lose their ability to select an election system which they believe best promotes democratic and governmental goals.

This brief will discuss the States' interests in party responsibility and avoiding voter confusion; the serious administrative burden imposed by plaintiffs' rule; the lack of any evidence that the statute has harmed them; the role of the States in election administration and the requirement for equal voting qualifications under Art. I; and the significant admissions as to the States' interests now made by plaintiffs.

I. PLAINTIFFS FAIL TO DEAL WITH THE INTERESTS OF THE STATE.

A. Plaintiffs Totally Ignore Party Responsibility And The Importance Of Avoiding Voter Confusion.

As this Court recognized in Democratic Party v. Wisconsin, 450 U.S. 107, 124 n.28 (1981), "[o]bviously, States have important interests in regulating primary elections [citation omitted]." The Court considered these interests substantial, id. at 127, stating: " 'Neither the right to associate nor the right to participate in political activities is absolute.' " Id. at 124. Furthermore, Justices Powell, Blackmun and Rehnquist stated in their dissent:

> These [major political] parties play a central role in the electoral process in this country, to a degree that has led this Court on occasion to impose constitutional limitations on party activities. [citations omitted.] Arguably, the special status of the major parties is an additional factor favoring state regulation of the electoral process even in the face of a claim by such party that this regulation has interfered with its First Amendment rights.

Id. at 134 n. 9.

The dissent cited with aproval the prior case upholding the same Connecticut law involved here, Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), aff'd mem., 429 U.S. 989 (1976).

Democratic Party involved a state law and a national party. "Congressional regulations of national conventions or state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly diferent balance." Cousins v. Wigoda, 419 U.S. 477, 497 n. (1975) (Powell, J., concurring in part and dissenting in part).

Plaintiffs have not dealt with the chief interests of the State and have also misstated them, going so far as to suggest that the State is "requiring a political party to maintain a preexisting ideology or constituency." Br., pp. 9, 28.

To the contrary, the State law recognizes that a major political party serves an important function of free government. The parties are a link between the voters and their leaders. It is therefore essential to preserve the parties' responsibility to the public. Appellant's br., pp. 28-35.

As Edmund Burke stated, " '[p]arty divisions whether on the whole operating for good or evil, are things inseparable from free government.' " H. Mansfield, Statesmanship and Party Government, A Study of Burke and Bolingbroke 3 (1965). For this reason, party responsibility has always been vital to representative government. "Party responsibility means that party leaders should follow the rules laid down by the sovereign electorate." Id. at 153. A viable political party is a method of control by the people on their government. Id. at 192. 2/

Appellees in advocating an "open" primary lose sight of the fact that the issue is not which system may be best. The question is whether the State will continue to be "free to structure its political system to meet its 'special concerns and political circumstances,' "

2/ For example, Jefferson believed that a majority of the people could direct their rulers through the Republican party program and thus challenge the Federalist administration. Id. at 196.

Rodriquez v. Popular Democratic Party, 457 U.S. 1, 13-14 (1982), and to choose "the primary scheme that it thinks will best promote democratic, electoral and governmental goals." Nader v. Schaffer, 417 F.Sup. 837, 843 (D.Conn. 1976), aff'd mem., 429 U.S. 989 (1976). There is substantial evidence that the Connecticut law preserves party responsibility and prevents confusing party nominations from independent ones. See Appellant's br., pp. 27-41. Even the Court of Appeals acknowledged: "The further one moves down the ballot, the more difficult it is for voters to make selections without relying on the party label." J.S. App. 117-18 n.27.

A Connecticut legislator who is also a political science professor (Rep. Cibes) referred to the "great deal of comparative political research" which indicated that open primary states "have less responsive public policy decisions being made...." Appellant's brief, L.Add. 18a. A study of nominating systems based in part on Connecticut's found that there was a "close relation

among the legal rules that govern nominations, who influences nominations, and who eventually governs--the relation between process and substance." Keynes, Tobin and Danziger, Institutional Effects On Elite Recruitment, The Case of State Nominating Systems, 7 Am. Pol. Q. 283, 298 (1979).

> [L]egal rules that narrow the scope of conflict to a party's activists or registered voters can contribute to "responsible party government," as contemplated by E.E. Schattschneider (1942).

Id. at 296 (emphasis added).

* *

> From the perspective of liberal-democratic theory, the transfer of effective decision-making from party organizations to interest groups has several important consequences. First, interest-group elites are primarily responsible to their organizational constituencies rather than to broad electorates.

Id. at 297.

* * *

> Thus, increasing access of interest groups to and reducing control of political parties over nominations can actually substitute the influence of less visible and less accountable private elites for the influence of more visible and, theoretically, more accountable party elites.

Id. at 298. (emphasis added).

Connecticut, furthermore, has never sought to control the party's ideology or constituency, and to suggest that it has only serves to mask the real issues.

The question is not whether the closed primary is best for all states. Connecticut has decided that it is best for it, for reasons that are more than legitimate. The issue is whether a State will still be able to have a political system that will meet its special concerns and best promote its democratic and governmental goals, or whether that discretion will now be wrenched from it. Our state believes it important that the nomination bearing a major party label is in fact that of the party and not some other, anonymous group. For Connecticut, public accountability of a major party is impaired when the party's nominations are actually determined by those foreign to it. When accountability is lost, it is the public--not simply the party--which loses. As Woodrow Wilson stated: "This thing [the political party] that has

served us so well might now master us if we left it irresponsible. We must see to it that it is made responsible." W. Wilson, Constitutional Government In the United States, 220 (1908). Connecticut's judgment need not be imposed on other states. It is, however, entitled to understanding and respect under the Constitution.

B. Plaintiffs' Claim That Their Rule Does Not Interfere With Orderly Election Administration Completely Disregards The Facts.

As stated in our brief on the merits, pp. 74-78, plaintiffs' rule would lead to disorder and confusion because different voting qualifications, applying unevenly and irregularly to different parties and to different offices, would have to be enforced. Plaintiffs assert that we "produced no evidence below of undue cost, time or other practical obstacle" to this effect. Br., p. 31. They are clearly wrong.

First, the rule even on its face is not uniform.

Second, the stipulated facts state:

> 46. It is possible that there will be on the same ballot Republican Party primaries for offices (e.g., Congress) for which unaffiliated voters may vote under the Rule, together with offices (e.g., state senator, state representative) for which they may not vote.
>
> In such instances, special procedures will be necessary, as a practical matter, if the Republican Party Rule becomes effective. These procedures will, among other things, require that separate and distinct ballot labels be provided for unaffiliated electors either on the same or separate and additional voting machines. In addition, election officials, including voting machine mechanics and voting machine tenders, will require special training.
>
> 47. Furthermore, unaffiliated voters will have to be separated from enrolled members of other major political parties, including the Democratic Party, because they will not be permitted to vote on any Democratic ballot.
>
> 48. In all towns where primaries are held for offices for which unaffiliateds may participate under the party Rule, additional officials, as well as additional voting machines may, in many cases, be necessary to accommodate these voters.

Joint Statement of Facts, Appendix to Jurisdictional Statement Vol. II, pp. 267-69 (emphasis added).

In addition, the parties also stipulated:

> 52. If the Rule becomes effective, there will be a question as to what ballot the town clerk should send to an unaffiliated voter who requests one for a Republican primary. This question will be due to uncertainty as to what that voter's status will be on primary day. See Conn. Gen. Stat. §§ 9-133d, 9-140.

Supplemental Joint Statement of Facts, Id. at 286-87.

Plaintiff Weicker himself admitted to the legislature that the party "rule" would be expensive to administer:

> Rep. Atkins: * * * [A]n unaffiliated voter could only in that case vote for a congressional candidate, but not a state rep candidate. Wouldn't that be a costly proposal?
>
> Sen. Weicker: That's correct. I think that now, and I can only guess at the motivation of the delegates * * *

Leg. Add. to Appellant's brief, p. 9a.

As one Republican legislator also warned:

> Rep. Foley: * * * [C]ertainly we would have to have two machines [in] each district. If the Democrats decided to have the unaffiliates also within their primary at a future date, it might mean four machines.... [H]ere we are mandating costs for municipalities without providing compensation for them. * * *

Id. at 13a.

Professor Ronald D. Rotunda, a constitutional law specialist who was among those the District Court invited to participate as amicus curiae, stated: [3/]

> [Plaintiffs "rule"] does not open up all Republican primaries; it only opens up primary elections for certain electoral offices. If a primary election for the office of U.S. Senator takes place at the same time as a Primary election for city mayor or State Senator, for example, then the burden on state election judges may well be heavy and the confusion on the voters great. And, if the Republican Party can, unilaterally, impose such burdens on state primaries, then the Democratic Party should also be able to impose its own rules contrary to state law.
>
> The principle advocated by the plaintiff in this case seems to be that any state political party can invalidate all (or a portion) of any state law to which it objects. Even though a nonparty member could not force an open primary and invalidate the law, the political party could, if it chooses to do so. This principle does not find support in the case law.

3/ His works include Treatise on Constitutional Law, Substance and Procedure (1986), (co-authored with J. Nowak and J. Young) and Constitutional and Statutory Restrictions On Political Parties In The Wake Of Cousins v. Wigoda, 53 Tex. L.R. 935 (1975).

Appendix to Jurisdictional Statement, V.II, pp. 240-41.[4/]

When the Governor vetoed a bill in 1985 which would have allowed the parties to set their own rules for primary voter qualifications, he stated:

> It allows political parties to pick and choose which primaries are open to such participation, and allows the parties to change the eligible primaries when it becomes politically expedient to do so. If the parties were thus allowed to change their rules from election to election, this would create administrative chaos in the Office of the Secretary of the State and the offices of Town Clerks.

Governor's Veto Message, Appellant's Brief, Leg. Add., pp. 56a-57a, referring to Sen. Bill 5.[5/]

In urging that that veto be sustained, Senator O'Leary stated:

> I can't imagine anything more chaotic than to allow each respective political party, when the whim hit them in convention, every two years, to draw up a set of rules that would govern an election process .... there's bound to be differences

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4/ Contained also in Joint Appendix, pp. 110-15. Plaintiffs never objected to this letter.

5/ For the Governor's other reasons, see id. at 54a-56a.

> and discrepancies and confusion....[in] the system whereby our leadership is derived.
>
> * * *

28 Conn. Sen. Proc., Pt. 15, July 1985 reconvened Session, pp. 5818-19.

Two Republican Senators joined in supporting the Governor's veto. Id. at 5824; Conn. State Register and Manual 1985, p. 157.

Much is made by appellees of legislative testimony by Mr. Lenge, Director of the Secretary of the State's Election Division. Contrary to appellees' claim, however, he never said that monitoring unaffiliated voter participation would be "easily resolvable." Br., p. 32. Compare his complete testimony at J.A. pp. 89-93. He also did not say that absentee ballots could be prepared and distributed "without problem." Br., p. 31-2. He stated that town clerks would have to "print two versions of the absentee ballot and direct those respective versions to members of the party or unaffiliated electors as the case may be." J.A. 91-92. He also advised "that

there be two [voting] machines set up with two different ballot strips depending upon who is entering the machine." J.A. 92.

Mr. Lenge, moreover, had been asked only whether the bill allowing parties to set their own primary qualifications was "mechanically and technically possible" and whether the bill could be implemented under present statutes. J.A. 89. He was not asked what administrative burdens or practical problems would be involved, or whether there would be any voting mistakes, voter confusion or disruption. He was also not asked what additional costs would be imposed. Id.

After the Supreme Court noted probable jurisdiction, the Court of Appeals, on April 17, 1986, granted the State's request for a stay. The State's application was based on affidavits from Mr. Lenge, Director of Elections, both the Republican and Democratic Registrars of Voters of Bridgeport, Connecticut, and other materials previously discussed.[6/]

6/ A certified copy of the additional part of the record comprising the stay file was transmitted to

(footnote cont'd)

As this Court has ruled, "[w]e may properly take judicial notice of the record in the litigation between the same parties who are now before us." Shuttlesworth v. Birmingham, 394 U.S. 147, 156-57 (1969), referring to related proceedings. [7/] In his affidavit, Mr. Lenge stated that to have the same voting machine serve different classes of voters as required by plaintiffs' "rule" would involve not only a major training effort for mechanics, but also "voter confusion and substantial burdens on state election administration." Add., 32a. Votes could be

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the Supreme Court by the Court of Appeals on July 23, 1986. See Rule 13.1, Supreme Court Rules.

7/ Accord, National Fire Ins. Co. v. Thompson, 281 U.S. 331, 36-37 (1930), and cases cited therein: Bryant v. Carleson, 444 F.2d 353, 357-58 (9th Cir. 1971), "[W]e take judicial notice of a number of developments since the taking of this appeal," including affidavits and documents filed in the court below and stay proceedings); Jacques v. United States RR Retirement Bd., 736 F.2d 34, 40 (2d Cir. 1984). ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 n.2 (5th Cir. 1981).

improperly restricted due to mechanical programming error.

In addition, "[o]perator error on otherwise properly programmed voting machines is likely to occur," due to the need to move an exterior latch to the correct position, depending on each voter's status. Id. at 34a. The Bridgeport Registrars in their bipartisan affidavit also confirmed this.

As an alternative, separate machines could be used, the Elections Director stated, but "there are practical difficulties and administrative burdens associated with this measure... [which] would be substantial" if voter turnout was large. Id. at 35a. He estimated that some towns would not have enough voting machines, which cost up to $2895 each. Id. In addition, "[T]he possibility of administrative mistakes exists, namely allowing the wrong elector into the segregated machines." Id. at 36a.[8/] "The potential for this kind of

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8/ The elections Director referred to a 1979 town primary where Democrats and unaffiliated voters

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error is greatly magnified when unaffiliated electors are permitted to vote in a party primary for some but not all of the offices that the party members can vote for." Id. at 36a-37a. These problems, too, were corroborated by the Bridgeport Registrars who also stated:

> Some of this [inability of election personnel] is due to inexperience and the fact that this is an infrequent job for these poll workers. Under this party rule we feel that these problems will compound.
>
> The hiring of fifty-nine (59) additional poll workers will create another problem in this kind of primary. Even under the existing system, without this party rule, there are occasions when we do not have the polling positions filled until the day before the election and sometimes not until the day of election. The hiring of poll workers, to us, would be the most difficult problem to solve in this kind of primary. We have a large Hispanic population so therefore consideration must be given to the hiring of bi-lingual workers with their instructions and associated problems.

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> had been erroneously permitted into the Republican voting machines. The State Superior Court had to order a new primary as a result. Id. at 36a, 43a-44a.

Based on their experience, the Registrars foresaw the possibility of "unaffiliated voters trying to vote for offices other than those they are entitled to under the party rule, the possibility of voters getting into the wrong lines and poll workers not following instructions given under the new rule." Id.

Although it might also be possible to use paper ballots instead of more machines, these "procedures are antiquated and unfamiliar to most local officials," and also involve much time and possible inaccuracies, according to the Elections Director. Id. at 37a. Absentee ballot expense and possibility of error would also be increased and other costs also incurred by the public. Id. The Director of Elections concluded:

> 12. As I stated before the General Assembly when asked whether an open primary for restricted offices is "workable", I meant when I said that such a primary is "workable" that it is mechanically possible, but the mechanics of implementation, outlined above, involve risks of voting error, voter confusion and serious administrative problems as well as additional expense.
>
> 13. Of course, these problems would be compounded if the Democratic Party adopted a

similar party rule which they could claim that they are entitled to do under the court's decision. Id. at 41a.

Although appellees opposed the stay, they never disputed these affidavits with any of their own at the time. 9/

9/ On August 5, 1986, they moved to vacate the stay and provided, inter alia, an affidavit from a Republican registrar claiming that there would be "no administrative difficulties" in carrying out the party "rule." The State submitted opposing affidavits from not only the Elections Director, but also a voting machine mechanic instructor and three Republican Registrars of Voters. Two of these were from municipalities with conflicting voter qualifications in Darien and Norwalk. These affidavits confirmed the difficulties previously described, now aggravated by lack of time. The need to hire and train additional workers was considered by the Norwalk Republican Registrar to be the most serious problem. Id. at 101-02a. Even in Greenwich, with no conflicting voter qualifications, plaintiffs' rule would double the cost of the primary, chiefly because of the need for more workers. Id. at 114a. The Republican Registrar there stated that "[i]f the Party Rule is required to be enforced, then I believe this would cause difficult problems for our town primary election." Id. at 113a. The Court of Appeals denied plaintiffs' motion to vacate the stay on Aug. 21, 1986. Id. at 119a.

Plaintiffs claim that the lower courts rejected the State's position that the "rule" may seriously interfere with public administration of primary elections, and that this Court is powerless to review this matter.

First, the District made no findings at all on this important issue, and did not even include it in the interests "principally" relied on by the State, 599 F.Supp. at 1238. The Court of Appeals never discussed the problem of administering conflicting voter qualifications.

The stipulated facts concerning the increased administrative burden and cost due to conflicting voter qualifications and the accompanying legislative evidence, previously discussed, were not dealt with in the rulings below. See Appellant's brief, pp. 74-78.

When a constitutional decision depends upon the facts, these "constitutional facts" may be independently evaluated by the Supreme Court, although previously ruled on below. 2 C. Antieau, Modern Constitutional Law (1969), 700. "[T]he Court may ascertain as it sees fit any

fact that is merely a ground for laying down a rule of law...." Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924) (Holmes, J.). [10/]

The prospect of voter confusion due to conflicting voter qualifications goes beyond the administrative burden, formidable as it is. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555 (1964). Such debasement or dillution can occur just as readily by voter confusion and election mistakes as it can by outright abuses.

II. THERE IS NOTHING IN THE RECORD TO SHOW THAT THE STATE STATUTE DENIES THE PLAINTIFFS A FAIR CHANCE TO INFLUENCE THE POLITICAL PROCESS.

10/ "[W]henever a conclusion of law of a state court as to a federal right and finding of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts ...." Norris v. State of Alabama, 294 U.S. 587, 590 (1935) (Hughes, C.J.). "If this requires an examination of evidence, that examination must be made." Id.

In Davis v. Pandemer, ____U.S._____, 54 L.W. 4898 (1986), this Court held that plaintiffs must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group to show that a redistricting plan violated the Equal Protection clause." Id. at 4903 (emphasis added). The Court noted that "the power to influence the political process is not limited to winning elections." Id. at 4904. "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or groups of voters' influence on the political process as a whole." Id. at 4905. There must be evidence of "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." Id.

Otherwise, attacks on state plans "would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the

legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls." Id. at 4905. The same considerations should apply here because a State "is free to structure its political system to meet its 'special concerns and political circumstances' " and the State's electoral system is entitled to "substantial deference." Rodriquez v. Popular Democratic Party, 457 U.S. 1, 13-14 (1982).

Although plaintiffs claim that they are in the minority (Br., p. 2, 26), their party now controls the State legislature and half of Connecticut's Congressional seats. Conn. State Register and Manual 1985, pp. 119-33, 179, 181. Moreover, there is nothing in the record which shows that the State law which applies equally to both parties and which was also passed by a Republican House of Representatives [11/] has caused plaintiffs to suffer any

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11/ Plaintiffs admit that the Court of Appeal erred on this point. Br., p. 6 n.2. However, their claim that

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electoral loss.

Plaintiffs claim that their rule "represents a determination by the Party" that a coalition with many independents will give the Party a chance to rule. Br., p. 18. It is also alleged that the "rule" will result in bipartisan support for the Party. Id. at 20-21.

There is absolutely nothing in the record to show that the Party determined any of this, or why the rule was adopted. Nor is there anything in the record to show that the Rule may in any way achieve these objectives. As appellees themselves have emphasized, there was no evidence admitted before the Court other than stipulated facts and documents.[12/]

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their 1984 legislative proposals were defeated by voting along "strict party lines" (Br., p. 6) is not correct. Nine Republicans joined in defeating one of these amendments, and eight Republicans voted against another. J.S. App. 259 (referring to stipulation).

12/ Appellees' brief, p.7 n.4. This is in addition to the legislative transcripts which appellant provided the Court at its request.

Furthermore, as stated in our prior brief on the merits (p.70), some of the Republican subcommittee members when deposed even contradicted plaintiffs' claim that they had concluded: "[T]he Republican Party would: increase its chances of winning general elections; nominate candidates with greater bipartisan support; increase the involvement of unaffiliated voters in the electoral process in general, and strengthen the two party system by allowing unaffiliated voters to vote in Republican Party primaries." J.S. App. 249-50.

After the depositions, this proposed stipulation was dropped. J.S. App. 281-87. The withdrawal also followed discovery admissions suggesting that the "rule" might have been motivated at least in part by Weicker's interest, as distinguished from the party's, in obtaining his nominations with the help of unaffiliated voter support. See Appellant's brief, p. 69; J.A. 116-29.[13/]

13/ Plaintiffs complain that certain depositions previously cited were not originally filed with the

(footnote cont'd)

Plaintiffs also assert: "There is no dispute...that the party rule was formally adopted by the entire

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District Court. Br., p. 7 n.4. They were not originally filed because of two of the witnesses who were members of plaintiff party's subcommittee and who were represented by plaintiffs' previous counsel had neglected to return their signed copies to the Court Reporter. See affidavit of reporter, add. at 27a.

Plaintiffs also cite a District Court Order, entered long after the appeal was taken to the Supreme Court, to the effect that appellant had cited in her Supreme Court brief deposition material "not presented to the District Court or relied upon by either party...." Br., p. 7 n.4. The language from that Order was taken almost verbatim from a draft submitted by plaintiffs without prior notice to appellant, a draft not received by us until three days after the District Court issued its order. Furthermore, the order is incorrect. In her objection to summary judgment, appellant stated that the affidavit originally relied on by plaintiffs was "disputed by discovery materials." J.S. App. 163, 171. Appellant also relied on discovery materials in her Answers to Interrogatories, July 10, 1984, and Motion to Compel, July 9, 1984, in support of her position that plaintiffs' "rule" was intended to "promote the personal interests of one or more of the plaintiffs as incumbents in office." The District Court recognized this dispute in denying motions for summary judgment and providing for discovery on July 6, 1984, and in

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Republican Party after initiation by the State Central Committee, [and] study by a subcommitee of diverse Party members...." Br., p 7 n.4. There is absolutely nothing in the record to show that the "entire Republican Party" adopted the "rule." The stipulated documents show that only 57% of a party convention composed of delegates not chosen to deal with this issue but who were

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overruling plaintiffs' discovery objections on July 9, 1984. J.S. App. 274-80; add. at 11a-18a.

The District Court Order on which plaintiffs' rely is also incorrect when it states "no part of these or any other depositions was presented to this court...." Order April 14, 1986, p. 2. The record shows that the D'Amore and Gold depositions were provided to Judge Cabranes himself on July 24, 1986. See Court reporter's letter, add., at 23a; docket entries July 25, 1984, J.A. 4.

In addition, the letter mailed by Senator Weicker in his 1982 campaign for the Republican U.S. Senator nomination, urging Independents to register with his party so they could vote for him in the upcoming primary, was by agreement included in the Joint Appendix in the Court of Appeals. Add. at 24a-25a; see J.A. 116-19 (Ex. I to D'Amore deposition).

instead holdovers from a prior convention voted for the "rule." J.A. 49-64, 71-72; appellant's brief, p. 72 n.26.

Plaintiffs' other claim is in fact sharply disputed, based on the deposition of Thomas D'Amore, Weicker's former campaign manager and present party chairman. Plaintiffs' obtained from the District Court an order, over objection, placing the entire deposition under seal.[14/] For that reason, we are unable to quote from it. However, we refer the Court to pp. 28-30, 48-50, 53-54, 56, 59-60, 63, 67, 69, 72, 74, 76-78, 202-03 of that deposition. Plaintiffs also assert (br., p. 7 n.4) that any suggestion that the "rule" was motivated by " 'personal interests' " of one of the plaintiffs (i.e., Weicker), is "wholly unsupportable." Brief, p. 7 n.4. The depositions show quite the contrary.[15/] Furthermore, plaintiffs' admissions (which

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14/ Protective Order, July 26, 1984, in Record. The Gold deposition and the Response to the Request for Production were also sealed, over objection.

15/ See, e.g., D'Amore dep., pp. 14-28, 32-34, 36-38, 82, 84-88, 97-107, 111-13, 116,129-31, 134-35,

(footnote cont'd)

are not under seal) showed that the Senator when challenged for renomination in 1982 said that without an influx of non-Republicans his opponent could win the Republican primary. He tried to solicit independents to register Republican for the purpose of the primary. J.A. 116-129. In a letter to independents, he said, "I need your help...I need your vote." J.A. 116-19 (emphasis in original). Plaintiffs further admitted that the 1984 attempt to include unaffiliated voters in Republican Party primaries indicated that Weicker was "using his position as titular head of the Republican Party to pave the way for a strong gubernatorial run [by him]." J.A. 125-29.

(footnote cont'd from previous page)

148-49, 156, 177-82, 192-93; Ex. for id., C-1, C-2, D(p.1), G-K, O, P, T, V, W,X; Gold dep., pp. 39-44, 48-49, 55-71, 87-92, 105-07, 112-15, 120-23, 148, 155-61, 167, 173-76, 182-83; Ex. for id., A-1, 2, 8, 13. See also dep. of Mae Schmidle, subcommittee member and Weicker supporter, who was aware of Weicker's efforts to have unaffiliated voters register Republican in 1982. Add., at 6a-10a (not under seal).

In view of the fact that the stipulations were silent as to the reasons for the plaintiffs' "rule", and that the discovery admissions contradicted plaintiffs' original claims on these matters, it was improper and unfair for the Court of Appeals to make any assumptions as to the subcommittee's reasons. J.S. App. 22, 107-08.

Nor is there anything in the record that would show that the "rule" would in fact achieve plaintiffs' alleged objectives. A subcommittee member acknowledged as to plaintiffs' claim of "greater bipartisan support" due to the "rule": "Bipartisan support is usually Republican and Democrat, and the Democrats--we have not asked to allow the Democrats to vote in our primaries." Deposition of Fred H. Lovegrove, Jr., July 13, 1984, p.9. Ms. Schmidle of the subcommittee, referring to plaintiffs' original claim about the subcommittee's conclusions. stated: "The first thing I said maybe was to increase your chances of winning elections, no one has proved that...." Dep. of Mae Schmidle, July 13, 1984,

p.29.[16/]

It is said that the State law prevents plaintiffs from soliciting independent support, selecting their own "ideology or constituency," expanding voter participation in their "candidate selection process," adding new members, forming new coalitions and appealing to a diverse electorate. Br., pp. 9,11, 13, 15, 23. However, there is absolutely nothing in the record to support these charges. Plaintiffs are completely free under State law to poll independents, consider their views in all party affairs, and solicit their votes in the general election. More important, they can urge independents to become Republicans, as Senator Weicker did in 1982. They are certainly free to select their own ideology, to expand

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16/ Even one of the articles cited by plaintiffs acknowledges: "There are obvious limitations on our ability to explain variations in voting turnout by using aggregate data." Jewell, Voting Turnout In State Gubernatorial Primaries, 20 W. Pol. Q. 236 (1977). See also J. Clotfelter and C. Prysby, Political Choices, A Study of Elections and Voters 29 (1980).

their own membership, and to appeal to a diverse electorate. The state statute is completely neutral in this respect. See Appellant's brief, pp. 62-66.

Party enrollment, furthermore, requires only that one fill out a short form up to twelve noon the last business day before a primary to vote in that primary. Conn. Gen. Stat., § 9-56. No loyalty oath or fee is required. Id. If an unaffiliated chooses not to register Republican, this is due to that voter's personal decision, not the State law.

Furthermore, plaintiffs claim that absent unconstitutionality the party's "right to choose its members and its requirements for participation in party affairs remain[s] absolute," (br., p. 16, emphasis added) itself has very dangerous overtones. For example, one of the articles cited by plaintiffs states:

> "[T]he party can determine how potential affiliates must demonstrate that they meet affiliation requirements. Such a determination could involve an examination of the beliefs of these potential affiliates. This ability to inquire into such beliefs or actions is necessary to

> implement the party's associational right to define its shared purposes and to set its own boundaries. See Democratic Party v. Wisconsin, 450 U.S. 107, 122 (1981). [Recognizing, however, that "the party's action might violate an individual right of privacy...."]

Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 117, 126-27 n.50 (1984) (emphasis added). Compare, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.")

III. APPELLEES IGNORE THE CONSTITUTIONALLY ORDAINED ROLE OF THE STATES IN ELECTION ADMINISTRATION AND THE REQUIREMENT FOR NONDISCRIMINATORY QUALIFICATIONS UNDER ART. I.

Appellees claim that under Ray v. Blair, 343 U.S. 214 (1952), state primaries are not subject to certain Constitutional protections. Br., p. 43. This is based on a

key omission in their quote from that case. The entire sentence should read: "The fact that the primary is a part of the election machinery is immaterial unless the requirement of pledge violates some constitutional or statutory provision." 343 U.S. 227 (emphasis added). Appellees omitted the underlined clause.

It is the vital electoral role of the States, as provided under Art. I, §§ 2 and 4 and other authorities cited in appellant's brief, pp. 22-27, 70-88, and 93-96, which distinguishes this case from one involving the associational rights of a private debating society.

Appellees also rely on Newberry v. United States, 256 U.S. 232 (1921), in asserting that primary elections are not guarded by Art. I. Br., p. 44. However, as this Court recognized in Buckley v. Valeo, 424 U.S. 1, 13-14 n.16 (1976):

> Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Art. I, § 4, Newberry v. United States, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913 (1921), it later held that primary elections were

> within the Constitution's grant of authority to Congress, United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

Appellees' argument, therefore, undercuts Congressional authority as it does that of the States.

Appellees' assertion that "[t]he founding fathers clearly did not anticipate that Article I, § 2 would apply to primaries, as neither political parties nor primaries then existed" (br., p. 44), is the very one this Court rejected in United States v. Classic, 313 U.S. 299, 315-16 (1941), when it stated:

> We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.... [as] a continuing instrument of government [citations omitted]. If we remember that "it is a

> Constitution we are expounding", we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.

Appellees' claim that the "State cites no authority" to show that voter qualifications for Congressional and State legislative primaries be equal and non-discriminatory simply ignores the Supreme Court decisions, The Federalist, and other authorities discussed in appellant's brief, pp. 89-93.

IV. APPELLEES HAVE MADE IMPORTANT ADMISSIONS CONCERNING THE STATE'S INTEREST IN REGULATING MAJOR PARTY PRIMARIES.

Appellees have made some key admissions in their attack on the statute. First, they acknowledge that "because primaries are an integral part of a state's electoral system the conduct of political parties in a primary may constitute state action under the Fourteenth and Fifteenth Amendments." Br., pp. 10-11.[17/] This

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17/ This is in marked contrast to the District Court decision, which attempted to dismiss this principle

(footnote cont'd)

indicates that Art. I should also apply because its "command...is secured against the action of individuals as well as of states," United States v. Classic, supra, at 315. Second, the fact that state action may be involved here underscores that we are dealing with a matter of legitimate State interest.

Appellees also admit that the State "might further require the party to establish that its proposed Rule is administratively feasible." Br., p. 36. In view of the stipulated facts and other materials discussed previously, plaintiffs fail their own test. Their "rule" lacks even the safeguards that the Director of Elections stated would be needed. J.A. 90-93.

Plaintiffs also acknowledge that the "State could provide for a temporary and non-disclosable affiliation

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(footnote cont'd from previous page)

> as one based on "mischaracterization of dicta." J.S. App. 156 (original language, later deleted in the opinion reported at 599 F.Supp. 1228).

for purposes of the primary only" which could occur on primary day. Br. p., 36.[18/] This represents a retreat from the District Court's opinion that "[a]ny effort by the state to substitute its judgment for that of the party on this question...substantially impinges on First Amendment rights," J.S. App. 185, as well as from that of the Court of Appeals. See J.S. App. 119-20, 132.

Furthermore, there is little difference between the affiliation requirement plaintiffs now suggest, and the one involved in this case. In Connecticut, one may affiliate with a party virtually one day before the primary and disaffiliate at any time. [19/] Since when is a 24 hour difference enough to invalidate an election law?

18/ This remarkable concession even at this late stage demonstrates that appellees recognize that the administrative burdens of this "rule" are real and that the "burden," if any, of the State law is absolutely negligible.

19/ Conn. Gen. Stats. §§ 9-56, 9-59. One who disaffiliates cannot vote in another party's primary for six months.

Plaintiffs' arguments would bog down the judiciary in mindless quibbles on how an election should be run and invite innumerable challenges, based not on unfair burdens but on narrow partisan self-interest.

Plaintiffs also concede that Democratic Party v. Wisconsin, 450 U.S. 107 (1981), and Cousins v. Wigoda, 419 U.S. 477 (1975),

> "involved a national party's rules for presidential delegate selection, and that different considerations may apply to state involvement in a state party's primary....[A] state's interest under Art. I, § 2 and § 4 and the Seventeenth Amendment in supervising wholly internal elections is more direct than its responsibility over national presidential elections." Br., pp. 37-38.[20/]

20/ A recent treatise notes that Democratic Party did not decide the issue of a state's regulation of a state political party convention. "There is certainly no absolute right of a political party to control its membership in all circumstances; the White Primary cases and open primary cases are proof of that." Rotunda, J. Nowak and J. Young, 2 Treatise On Constitutional Law (1986) 652. See also id. at n.55. Furthermore, "[a] political party, certainly a major political [party], is not an intimate association," referring to Roberts v. United States Jaycees, 468 U.S. _____, 104 S.Ct. 3244 (1984). Id. at 651 n.54.

Plaintiffs' claims, however, that only "internal party processes" are involved here (br., p. 38), are completely refuted by the substantial public burden and expense of their "rule" and the State's other legitimate interests. Plaintiffs also admit that the State

> may establish minimum voter participation requirements in its state primaries greater than those adopted by a state party.... State laws directed to the conduct of a primary which are necessary to insure the fairness and representative character of the process clearly may serve compelling state interests and may override a party's competing First Amendment rights." Br., pp. 38-39.

This is another withdrawal from the almost absolutist position of the lower courts. See J.S. App. 119-20, 132, 185. It is asserted, nevertheless, that the party may allow ineligible persons to vote in a primary simply to "expand" voter participation. Br., pp. 14, 38-9. Can the party "expand" such voting to non-residents, sixteen year olds, aliens or others not registered to vote?

CONCLUSION

There is nothing in the record to show that the state statute has "substantially disadvantaged" plaintiffs or is in any way unreasonable or discriminatory. See Davis v. Bandemer, supra, at 4905; compare Andersor v. Celebreze, 460 U.S. 780, 788 (1983). As plaintiffs themselves acknowledge, the States have an interest in ensuring a fair and representative nominating process. This includes the accountability of the major nominating parties, avoiding voter confusion due to misuse of the major party labels, and ensuring an orderly conduct of elections.

The requirement of the statute is de minimus but the administrative confusion and chaos due to party rules that could change every year would be substantial. An affirmance would envelop the federal courts in countless challenges and turn them into election boards in cases based simply on ever shifting partisan dictates. For all

the above-stated reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and that the case should be remanded with direction that judgment be entered for the appellant.

Respectfully Submitted

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September 1986

ADDENDUM

NO. 85-766

In the Supreme Court of the United States

October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ADDENDUM

DEPOSITION OF MAE SCHMIDLE,
MEMBER OF PLAINTIFF PARTY'S SUBCOMMITTEE
WHICH HAD RECOMMENDED THAT UNAFFILIATEDS
VOTE IN REPUBLICAN PRIMARIES, JULY 13, 1984

* * *

Q [Mr. Schaefer] [referring to conclusions plaintiffs claimed their subcommittee reached in recommending original version of party rule, in Ex. A for Id., Joint Statement of Facts, proposed ¶ 11, which was later withdrawn]

All right. That refers to what the subcommittee concluded, correct?

A This document says that's what the subcommittee concluded. I'm not sure that those were my conclusions.

Q All right. Could you please elaborate?

A Well, I would take these items one by one and give you my reaction to them

and then I will tell you where I'm coming from. It says Republican Party, that it would increase its chances of winning in general elections. My answer to that is maybe. I certainly would not be definite on that point. That it would nominate candidates with greater bipartisan support, again my response to that is maybe. That it would increase the involvement of unaffiliated voters in the electoral process in general, my response to that is absolutely. I think that's exactly what would happen and I think that's good. That it would strengthen the two-party system by allowing the two-party system to participate in Republican Party primaries, maybe.

Q All right. When you say "maybe", what do you mean by that?

A Well, I think that's a matter of somebody's opinion. I don't really think that anybody can prove conclusively that you're going to strengthen the two-party system any more than you can conclude you're going to weaken the two-party system.

Q Has that been proved in your own mind that it will strengthen the two-party system?

A I think that's possible, but I don't have any proof positive. I think you have to go through a couple elections and then compare after.

Q For the other matters that you refer to as maybe, is it fair to say those have not been proven to your satisfaction at this point?

A The first thing I said maybe to was increase your chance of winning general elections, no one has proved that, and to nominate candidates with greater bipartisan support, maybe. And increase the involvement of unaffiliated voters, I say absolutely.

Q Increase its chances of winning general elections, no one has proved that, in your opinion?

A Right.

Q Nominate candidates with greater bipartisan support, no one has proved that in your opinion?

A That's right.

pp. 28-29.

* * *

MR. SCHAEFER: Referring to this conclusion about what the subcommittee concluded.

A You know, I sort of feel that the way in which this is phrased, it sort of is putting words in the mouth of all Republicans or maybe words in the mouth of the Republican Party.

p. 34.

* * *

Q Is it fair to say that you were a supporter of Senator Weicker?

A It's fair to say that I have supported him and I have voted for him. I am not a carte blanche supporter of Senator Weicker. You know, we have a kind of relationship where I can tell him that I disagree with some of what he's doing.

pp. 69-70

* * *

Q Did you say you did attend the 1982 state convention?

A What I said to you was I think I did, I missed one convention along the line, but I can't remember. Eighty-two was the Bush-Weicker, I was there.

Q Who was your choice between Weicker and Bush?

A My choice was Weicker.

p. 72

* * *

Q Were you aware there were many Republicans who opposed Senator Weicker?

A Yes.

Q Were you aware that there were many Independents that supported Senator Weicker?

Q I was aware that there were some. I certainly didn't know numbers. The same way with Republicans. I was aware there were some.

pp. 72-73

* * *

Q You're aware today that there are many Republicans that do not like Senator Weicker?

A I know there are some.

Q You're aware that today he has substantial support among Independent voters, isn't that true?

A Again, I cannot agree or disagree with your word "substantial." I know there are unaffiliated voters. We don't have Independent voters in the State of Connecticut. There are unaffiliated voters who support Senator Weicker, yes.

pp. 73-74

* * *

Q You're aware that in the first part of 1982, Senator Weicker sought to have Independents register as Republicans? Are you aware of that fact?

A I'm aware that there was a move to have unaffiliated voters register with the party and there also was an even greater move to have Democrats change their affiliation.

Q But that effort was directed to both Democrats and unaffiliated voters as well?

A I think so.

Q Did that occur in your area?

A I think it occurred all across the state.

p. 75

* * *

Q Okay. You're aware that Senator Weicker believed that this was in his interest?

A Well, I would have assumed that he would believe that, otherwise he wouldn't be doing it.

p. 76

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Title omitted in printing)

July 5, 1984

EXCERPTS FROM PLAINTIFFS' OBJECTION TO DEFENDANT'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS, WITH COURT'S ENDORSEMENT OVERRULING OBJECTION

Plaintiffs, through counsel, object to each and every request for production of documents contained in defendant's request, dated June 29, 1984. All requests are directed to ascertaining the purpose of the plaintiff Republican Party in adopting its Rule. The question of plaintiff's purpose or motivation is not relevant to the determination of the Constitutional issues before this Court and, as such, defendant's request is not reasonably calculated to the discovery of admissible evidence.

In addition, plaintiffs object to the following specific production requests:

1. Any and all polling data, including cross tabulations from January 1, 1982 until the present on the subject of Senator Weicker, including but not limited to that data which concerns his support among Republicans, unaffiliated voters and Democrats and that data which concerned his support as opposed to support for Prescott Bush, Jr.

OBJECTION: The information sought is clearly not relevant to this action as it relates to materials relating to the political campaign conducted by plaintiff Weicker nearly two years prior to the adoption of plaintiff's Rule. Such discovery request seeks information which was developed by plaintiff Weicker in connection with said campaign and is proprietary in nature. Discovery of such information would constitute an impermissible intrusion into plaintiff's political campaign, its activities, strategy and procedure and is not reasonably calculated to the discovery of admissible evidence.

2. Sample letters soliciting Democrats and unaffiliated voters to change their registration to Republican from January 1, 1982 to the present.

OBJECTION: This request, particularly concerning plaintiff's efforts relative to Democratic voters, is not reasonably calculated to lead to the discovery of admissible evidence.

3. Any and all documents, papers, notes or memoranda concerning the efforts of Senator Weicker's campaign to solicit changes in registration as stated in paragraph 2 herein, including but not limited to discussions of strategy and/or the reasons for such efforts.

OBJECTION: The information sought is clearly not relevant to this action as it relates to materials relating to the political campaign conducted by plaintiff Lowell Weicker nearly two years prior to the adoption of plaintiff's Rule. Such discovery request seeks information which was developed by plaintiff Weicker and is proprietary in nature. Discovery of such

information would constitute an impermissible intrustion into plaintiff's political campaign, its activities, strategy and procedure and is not reasonably calculated to the discovery of admissible evidence.

* * *

THE PLAINTIFFS

(Signature and Certification omitted in printing)

(Court's endorsement overruling objection)

One of the three issues in dispute is what conclusions were reached by the subcommittee of the Republican State Central Committee regarding the purposes to be served by the party rule at issue in this litigation. See Joint Statement of Facts (filed June 6, 1984) ¶ 11. Thus plaintiffs' argument that discovery directed at this question is irrelevant is not persuasive. Accordingly, the plaintiffs' objection is hereby overruled. See Rule 26(b)(1), Fed. R. Civ. P. (information sought in discovery need only appear "reasonably calculated to lead to the discovery of admissible evidence"); 4 Moore's Federal Practice ¶ 26.56[1] (2d ed. 1983). Plaintiffs may make whatever applications concerning a protective order, pursuant to Rule 26(c)(7), Fed. R. Civ. P., that they deem appropriate in the circumstances. So ordered.

Hartford, CT
July 9, 1984

/s/Jose A. Cabranes
Jose A. Cabranes, U.S.D.J.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF CONNECTICUT

(Title omitted in printing)

JULY 9, 1984

MOTION TO COMPEL, JULY 9, 1984,
WITH COURT'S ENDORSEMENT GRANTING MOTION

Defendant respectfully moves for an order to Compel, pursuant to Rule 37, Federal Rules of Civil Procedure, compliance with its request for production dated June 29, 1984 on the grounds that the materials sought are reasonably calculated to lead to admissible evidence and are otherwise properly discoverable in respect to paragraph 11 of the proposed stipulation. Such materials are reasonably calculated to demonstrate that the "rule" in paragraph 7 of the complaint was intended, among other things,

1. To promote the personal political interests of one or more of the plaintiffs.

2. To promote the personal interests of one or more of the plaintiffs as incumbents in office.

3. To generate favorable publicity for the plaintiffs.

Defendant also moves to compel answers to the interrogatories dated June 29, 1984 which seek the substance and subject matter of testimony of plaintiffs' witnesses.

It is respectfully submitted that compliance with these discovery requests is

necessary several days in advance of the depositions which defendant has noticed for July 13, 1984.

DEFENDANT

(Signature and Certification omitted in printing)

Granted, see endorsement ruling on Objection to Defendant's Second Request for Production of Documents (filed July 5, 1984), entered this date. So ordered.

Hartford, CT
July 9, 1984

/s/Jose A. Cabranes
Jose A. Cabranes, U.S.D.J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

(Title omitted in printing)

EXCERPTS FROM DEFENDANT'S ANSWERS
TO INTERROGATORIES JULY 10, 1984

* * *

QUESTION 5. State the precise manner in which the defendant disputes that the members of the subcommittee established by the Republican Party of the State of Connecticut ("Republican Party") concluded that the party would increase its chances of winning general elections, nominate candidates with greater bipartisan support, increase the involvement of unaffiliated voters in the electoral process and strengthen the two party system by allowing unaffiliated voters to participate in Republican Party primaries, as referred to

in paragraph 11 of the Joint Statement of Facts.

ANSWER 5. Plaintiffs' "rule" was intended:

(1) To promote the personal political interests of one or more of the plaintiffs.

(2) To promote the personal interests of one or more of the plaintiffs as incumbents in office.

(3) To generate favorable publicity for the plaintiffs.

QUESTION 6. Identify the nature and source of the information relied upon by defendant in disputing the conclusions reached by the subcommittee, as referred to in paragraph 11 of the Joint Statement of Facts.

ANSWER 6. (1) Testimony and documents which are the subject of defendant's

discovery requests in this case and which have been or will be provided by plaintiffs.

(2) Documents provided by defendant in response to plaintiffs' request for production.

(3) Various polls concerning Senator Weicker conducted by the University of Connecticut which have been requested but not yet provided.

(4) Opinions of persons active in politics.

(5) Inferences drawn from the above that the "rule" intended for purposes set forth in Answer 5 herein.

* * *

QUESTION 8. Identify all documents relied upon by defendant in disputing the conclusions reached by the subcommittee, as

referred to in paragraph 11 of the Joint Statement of Facts.

ANSWER 8. (1) Documents which are the subject of discovery requests in this case and which have been or will be provided by plaintiffs.

(2) Documents provided by defendant to plaintiffs in response to plaintiffs' request for production.

(3) Various polls concerning Senator Weicker conducted by the University of Connecticut which have been requested but not provided.

* * *

Cunningham Reporting
Associates, Inc.
111 Gillett Street
Hartford, CT 06105
Tel: 521-3664

July 24, 1984

Judge Jose Cabranes
450 Main Street
Hartford, Connecticut

Re: Civil Action No. H-84-548
Republican Party of the
State of Conn., vs. Julia
H. Tashjian

Dear Judge Cabranes:

It is understood by our office that you are to receive the original transcripts of the depositions of Peter W. Gold and Thomas J. D'Amore, Jr. in the above captioned matter.

Also included are the exhibits to said depositions.

Sincerely yours,

CUNNINGHAM REPORTING
ASSOCIATES, INC.

Berta Stroshine

BAS
Enc.
cc: Stanley Twardy, Esq.
Ralph Elliott, Esq.
Daniel R. Schaefer, Esq.

Filed
Feb 21 4 00 PM '85
Clerk
U.S.DISTRICT COURT
HARTFORD,CONN.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR.	U.S.DISTRICT COURT DISTRICT OF CONN.
Plaintiffs-Appellees	CIVIL ACTION NO. H-84-548 (JAC)
V.	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
JULIA H. TASHJIAN, Secretary of the State of the State of Connecticut,	
Defendant-Appellant	FEBRUARY 20, 1985

STIPULATION

Pursuant to an agreement reached at the pre-argument conference for the Second Circuit on February 15, 1985, the parties stipulate that Exhibit I to the deposition

of Thomas J. D'Amore, Jr., taken on July 17, 1984, may be released from the protective order and may be included in the appendix to the briefs on appeal. This exhibit may be referred to as a letter mailed by Senator Weicker, Jr., in the 1982 campaign for the Republican nomination for the U.S. Senator.

PLAINTIFFS

By:/s/Stanley A. Twardy, Jr.
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Tel:(203)325-4491

By:/s/Daniel R. Schaefer
Assistant Attorney General
30 Trinity Street
Hartford, CT 06416
(203)566-4990

Approved.
It is so ordered.
Hartford,CT 2/22/85

/s/ Jose A. Cabranes,
Jose A. Cabranes, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

(Title omitted in printing)

Filed Mar 20 4:02PM '86
Clerk
U.S. DISTRICT COURT
Hartford, Conn.

- -

AFFIDAVIT OF MARGHERITA R. CUNNINGHAM,
OF MARCH 19, 1986

Margherita R. Cunningham, President, Cunningham Reporting Associates, Inc., a Connecticut corporation, being duly sworn, deposes and says:

That the depositions of Thomas F. Upson, Mae Schmidle and Fred H. Lovegrove, Jr., were taken on behalf of the Defendant in the above-captioned civil action on July 13, 1984, before Maureen C. O'Connor, a Court Reporter on the staff of Cunningham Reporting Associates, Inc.; that the

depositions were thereafter transcribed; that the reading and signing of the deposition of Thomas F. Upson were waived; that the depositions of Mae Schmidle and Fred H. Lovegrove, Jr., were submitted to the deponents for reading and signature; that the Deponents Schmidle and Lovegrove did not return their signed depositions to the Court Reporter for filing; that the deposition of Thomas F. Upson was not filed with the Clerk of the United States District Court within 30 days after transcribing because the Court Reporter was awaiting the return of the Schmidle and Lovegrove depositions; that upon the request of Daniel R. Schaefer, Assistant Attorney General of the State of Connecticut, duplicate originals of the three aforesaid deposition transcripts were

filed with the Clerk of the United States District Court, District of Connecticut, 450 Main Street, Hartford, Connecticut, on February 19, 1986; that Attorney Schaefer indicated at the time of his request that duplicate originals be filed that the subject case is now on appeal and carries Supreme Court of the United States Docket Number 85-766.

Margherita R. Cunningham, President
Cunningham Reporting Associates, Inc.

(Jurat omitted in printing)

AFFIDAVITS SUBMITTED BY DEFENDANT-APPELLANT

TO U.S. COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN SUPPORT OF A STAY PENDING APPEAL

TO THE U.S. SUPREME COURT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	:U.S. SUPREME COURT Docket No. 85-7011
v.	:
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER,JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR. Appellees.	:U.S. COURT OF APPEALS Docket No. 85-7011

AFFIDAVIT OF ALBERT P. LENGE,
DIRECTOR OF ELECTIONS
Office of the Secretary
of the State for the
State of Connecticut

I, **Albert P. Lenge**, being duly sworn, hereby depose and say:

1. I am presently the Elections Attorney and Director of Elections for the State of Connecticut. I have served in

this capacity since December, 1981. As chief legal counsel to the Secretary of the State, who is Commissioner of Elections, my duties include advising municipal election officials on the proper discharge of their election responsibilities and for providing legal advice on election law, upon request.

2. The federal court decision declaring Connecticut's closed primary statute unconstitutional presents serious administrative problems relating to this year's primary elections for offices that will appear on the regular state election ballot on November 4, 1986. These primaries are scheduled for September 9, 1986.

3. In the event of a Republican Party primary where unaffiliated electors

will, by party rule, not be entitled to vote for all of the offices on the party's primary ballot, the state and the towns will have to face three possible alternatives. The first one would require the mechanical voting machines in use in Connecticut to be programmed in one of two different ways. Both methods of programming the machines are unknown to most Connecticut voting machine mechanics and this unfamiliarity will necessitate a major training effort throughout the state to ensure that all voting machine mechanics thoroughly understand the correct way to set-up the machine, resulting not only in expense to both the state government and municipal governments, but also voter confusion and substantial burdens on state election administration set forth below.

4. The foregoing programming difficulties will increase the chance of programming errors. For example, an unaffiliated elector may find that the latch which is thrown to restrict his vote with respect to certain offices, does not successfully restrict his vote. In other instances, party members entitled to vote for all offices on the ballot may find their vote restricted due to mechanical programming error. Programming errors will effect the ability of individuals to exercise properly their franchise, and depending on the number of such programming errors found to occur, and depending on the margin of victory for the primary candidates, a new primary may be a necessity.

5. If a new primary is ordered, there will not only be additional costs to the public but also possible delays in the election.

6. Operator error on otherwise properly programmed voting machines is likely to occur. For example, in instances in which unaffiliated voters are able to vote for some but not all offices on the party's primary ballot, a primary official will have to move an exterior latch on the voting machine into one of two positions in order to restrict the vote. Similarly, the latch would have to be moved back into the former position in order to expand the ballot of a party member entering the same voting machine after the ballot of an unaffiliated elector is cast. It is easy to envision, under these circumstances,

operator error by the primary officials serving in this capacity and, depending on the number of such operator errors found to occur, and depending on the margin of victory for the primary candidates, a new primary may be a necessity.

7. An alternative to programming the voting machines is to have unaffiliated electors use separate machines, and there are practical difficulties and administrative burdens associated with this measure. The degree of administrative burden would depend on voter turnout and would be substantial if there was a large percentage turnout. For example, it is reasonable to expect that some towns will not have enough voting machines, including a sufficient number of spare machines. These machines cost between $1400 to $2895

each, depending on models and features, according to quotes that have been given to me.

In addition, the possibility of administrative mistakes exists, namely allowing the wrong elector into the segregated machines. For example, the records of this office show that in a Republican Primary in the Town of Windsor for town council in 1979, 2 Democrats and 3 Unaffiliated electors were erroneously permitted into the Republican voting machines, necessitating a court ordered new primary. Please see attached Head Moderator's Return and Superior Court ruling. The potential for this kind of error is greatly magnified when unaffiliated electors are permitted to vote in a party primary for some but not all of

the offices that the party members can vote for.

8. Another alternative to programming the voting machines would be to allow the unaffiliated to vote by paper ballot, but there are practical difficulties associated with this procedure also. The Connecticut General Statutes relating to paper ballots have rarely been used in modern times. The procedures are antiquated and unfamiliar to most local officials. These procedures are quite different, and in some cases, contradictory to procedures required for elections using voting machines. Counting of paper ballots takes an inordinate amount of time and can be inaccurate because of problems associated with a large-scale manual tabulation process as well as problems

discerning the intent of the voter in ambiguously marked ballots. There of course would be printing costs connected with paper ballots that can not be estimated at this time.

9. In instances in which unaffiliated electors are able to vote for some but not all offices on the party's primary ballot, separately configurated absentee ballots for unaffiliated electors will have to be printed by the municipal clerks with additional printing costs borne by the municipality. These ballots will create an increased likelihood in the rate of error in mailing the correct ballots to electors offering to vote in a party's primary by absentee ballot. Mistakes now happen when the geographical jurisdictions of offices on the primary ballot cut town

lines, as they frequently do in state elections. The rate of error is likely to increase when party rules restrict the franchise to classes of voters within the same voting districts at the same primary and, depending on the number of such clerical errors found to occur, and depending on the margin of victory for the primary candidates, a new primary may be a necessity.

10. The size of the printed official check lists of electors eligible to vote at a party primary will be greatly increased by adding the number of unaffiliated electors, and the additional printing costs will be borne by each town having such primary. In this regard, check lists must be printed as required by statute and also as a practical necessity in order to keep ineligible persons from voting.

11. The number of voting machines will have to be increased proportionately in order to accommodate the proportional increase of eligible unaffiliated electors entitled to vote in a party primary. In this regard, the statutory formula is one voting machine for every twelve hundred party members within a voting district; which will have to be increased to one machine for every twelve hundred party members and unaffiliated voters within the voting district. The cost of programming these additional machines, staffing them with operators, printing ballots and applying the ballots to the face of the machine, and moving and storage, will all be borne by each Connecticut town as an increased taxpayer expense in administering such party primary.

12. As I stated before the General Assembly when asked whether an open primary for restricted offices is "workable", I meant when I said that such a primary is "workable" that it is mechanically possible, but the mechanics of implementation, outlined above, involve risks of voting error, voter confusion and serious administrative problems as well as additional expense.

13. Of course, these problems would be compounded if the Democratic Party adopted a similar party rule which they could claim that they are entitled to do under the court's decision.

14. I would also add that we have no experience in administering an open primary with restricted offices depending on

variable voter qualifications. It is possible that there may be other problems which we can not foresee at this time.

15. The above is accurate and true to the best of my knowledge and belief.

/s/Albert P. Lenge
ALBERT P. LENGE

(Jurat omitted in printing)

Received
Sep 14 1979
Secretary of State

CORRECTED COPY

At a primary of the enrolled members of the Republican Party of the Town of Windsor legally warned and held on Sepember 11th, 1979, the following candidates received the number of votes annexed to their names respectively, for nomination to the offices of Town Council in said Town, to wit:

NAMES IN FULL	NUMBER OF VOTES IN FIGURES
TOWN COUNCIL	
Dale H. Dierksneide	631
Robert Geisel	945
Warren P. Jonnson	1,000
Barry R. Loucks	991
Mary Drost	633

Total number of names on Republican Enrollment List in the Town of Windsor, eligible to vote, 3,503

Total number of names cnecked as having voted	1,166	Republicans
	2	Democrats
	3	Unaffiliated
	1,171	TOTAL

Duplicate list of votes for nomination to tne Windsor Town Council, Certified by

/s/ Richard C. Bestor
Richard C. Bestor
Signature of Head Moderator

NO. 23 68 15

HENDRIK ELEVELD)SUPERIOR COURT

v.)COUNTY OF HARTFORD

RICHARD C. BESTOR,ET AL.)SEPTEMBER 18, 1979

MEMORANDUM OF DECISION

Pursuant to the provisions of § 9-329a of the General Statutes, the court orders a new primary to be held on Thursday, September 27, 1979, between the hours of 12:00 o'clock noon and 8:00 o'clock, p.m., upon the ground that "but for the improper actions of the election official the result of such primary might have been different." It is further ordered that the same candidates shall appear on the ballot and the same enrollment list as was used at the primary held on September 11, 1979. Had the five ineligible voters been properly

excluded from voting at the primary, the result might have been different and for that reason a new primary is ordered.

The clerk of the court shall forthwith transmit a copy of this order to the secretary of the state.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIA H. TASHJIAN, Secretary of the State Appellant,	U.S. SUPREME COURT DOCKET NO. 85-766
v.	
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR. Appellees.	U.S. COURT OF APPEAL DOCKET NO. 85-7011

STATE OF CONNECTICUT) COUNTY OF FAIRFIELD)

We, Edward T. Otremba, and Gloria R. Milano, being duly sworn, depose and say:

I, Edward T. Otremba, am the Republican Registrar of Voters. I have served in this capacity since January, 1970. During my tenure as Registrar I served with the Connecticut Registrars of Voters Association as President for four

(4) years, Vice President for two (2) years prior to that, and also as Legislative Chairman. My duties with the Association encompassed the review of proposed bills on election laws.

Occasionally I gave testimony before the Government Administration and Elections Committee on pertinent bills within their jurisdiction.

I, Gloria R. Milano, am the Democratic Registrar of Voters. I have served in this capacity since June, 1984, prior to that I was Deputy Registrar from January 1983, and prior to that Assistant Registrar from January, 1977.

The two Registrars are responsible for running elections and primaries which includes the hiring of machine mechanics and poll workers.

Services provided to the public by the Registrars include the keeping of the voter records, registration and party enrollment and voting lists.

Bridgeport has a population of 143,100 (1985 State Manual-Page 339). Our records show that there are 41,780 Democrats, 11,348 Republicans and 15,251 Unaffiliates, for a total of 68,379 voters.

We have reviewed the party rule which the Federal Courts have upheld in this case.

In the event that we have a Republican primary for offices covered by the party rule in this case as well as offices not covered by it, such as State Senator and State Representative, and Democratic primaries at the same time as is now the

procedure under state law, then we foresee the following problems:

1. Shortage of voting machines will necessitate the purchase of new machines. We will choose using separate machines rather than programming the same machines to handle both Republican and Unaffiliated voters, because of the complexity in programming and because poll workers would need to be instructed in a completely different way. We have twenty-nine (29) voting precincts and there would have to be at least one machine each for Republican, Unaffiliated and Democratic voters and, in some cases, two and three machines would be needed to accommodate the Democratic voters.

It is our practice to have one spare machine in each precinct even though state law does not require this. In that way if a machine breaks down we can reduce the waiting time for the voter by having a spare machine on site.

A minimum of One Hundred and Six (106) machines would be needed, plus twenty-nine (29) spares, to accomplish a smooth operation under our normal practice. We would then have to buy additional machines. The reason for this is because we normally use more machines in a double primary than we use in a general election. Under the new rule we would need separate machines for each class of voter. It is our estimate that there would not be enough voting machines throughout the state to run the primary under this new rule if these primaries were held in the other towns too.

2. More poll workers will be needed. At least one more checker and one more machine tender would be needed in each precinct to handle the Unaffiliated voters. With twenty-nine (29) precincts this would mean an additional fifty-nine (59) people as one precinct will need two machine tenders. We pay each checker $55 and each machine tender $45 for a primary. (This includes a paid instruction session.) Incompetency of some workers manifests itself and we are hard put to completely resolve this problem. Some of this is due to inexperience and the fact that this is an infrequent job for these poll workers.

The hiring of fifty-nine (59) additional poll workers will create another problem in this kind of primary. Even under the existing system, without this party rule,

there are occasions when we do not have the polling positions filled until the day before the election and sometimes not until the day of election. The hiring of poll workers, to us, would be the most difficult problem to solve in this kind of primary. We have a large Hispanic population so therefore consideration must be given to the hiring of bi-lingual workers with their instructions and associated problems.

3. Space in some of the polling places is rather tight so that setting up a Democrat line, and two Republican lines, with one for Unaffiliated voters would create a more restrictive operation. We have some polling places which are accommodating two precincts. We can envision voters getting into the wrong lines and voting for candidates other than those they are

legally allowed to vote for. This does happen on an ordinary primary day under the existing system. For example on September 10, 1985 we had both Democratic and Republican primaries for Mayor and other city offices and people who were ineligible to vote in a specific primary were erroneously allowed to do so.

4. Inquiries to this office are numerous on primary day and would most definitely increase with an expanded primary. With six (6) people, or more, handling the phones and over-the-counter problems, we find it difficult to manage, at times. This mostly occurs on general election days but occasionally on a primary day. With this party rule, we anticipate that this problem will be compounded to some degree. Because there will be more eligible voters

involved, we expect some Unaffiliated voters asking why they cannot vote for all candidates, especially those running on a local level and in whom they might be more interested.

5. Even if we did not have a Democratic primary at the same time, and even if we are limited to a partial Republican primary (for example: Governor and in one (1) district, State Representative), we feel that problems would still occur that would make the smooth running of the polling place improbable. The types of problems we can foresee at this time would be, Unaffiliated voters trying to vote for offices other than those they are entitled to under the party rule, the possibility of voters getting into the wrong lines and, poll workers not following instructions given under the new rule.

6. To summarize, we feel there would be a most difficult administrative problem in the actual operation of primaries under this party rule. We are almost sure that there will be greater confusion on the part of both poll workers and voters. The likelihood of a greater number of mistakes and improper ballots cast becomes evident, especially if there are full Democratic and Republican primaries.

This affidavit is true and correct to the best of our knowledge, information and belief.

/s/ Edward T. Otremba
Republican Registrar
of Voters

/s/ Gloria R. Milano
Democratic Registrar
of Voters

(Jurat omitted in printing)

ORDER OF COURT OF APPEALS
GRANTING DEFENDANT-APPELLANT'S
MOTION FOR RECALL OF MANDATE AND FOR
STAY OF ENFORCEMENT OF JUDGMENT PENDING
U.S. SUPREME COURT FINAL DISPOSITION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPUBLICAN PARTY OF :Docket No. 85-7011
STATE OF CONNECTICUT

vs.

TASHJIAN

* * * *

United States Court of Appeals
Filed
Apr. 17, 1986
Elaine B. Goldsmith, Clerk
Second Circuit

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted

and the mandate is recalled pursuant to the terms of Fed. R..App. P. 41(b), which provides that the stay shall continue until final disposition by the Supreme Court.

/s/ Irving R. Kaufman

JLO/per IRK

4/17/86
/s/ Richard J. Cardamone

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

ELAINE B. GOLDSMITH
Clerk

July 23, 1986

Supreme Court
of the United States
1 First Street, NE
Washington, D.C. 20543

Attention: S dy Nelson

Re: REP ICAN PTY ST. V. TASHJIAN
COA 85-7011, SC# 85-766

Dear Ms. Nelson:

Enclosed is the remainder of the court of appeals file, which consist of all moving papers in the motion to recall the mandate and for a stay of enforcement of judgment pending the U.S. Supreme Court review, and the order granting said motion

which is endorsed on the main motion.

Please incorporate these papers with the rest of the file that was previously transmitted.

Elaine B. Goldsmith,
Clerk

By: Lynn Little
Deputy Clerk

Encl.
cc: Daniel R. Schaefer
Assistant Attorney General

AFFIDAVITS SUBMITTED BY DEFENDANT-APPELLANT

TO U.S. COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN OPPOSITION TO PLAINTIFFS-APPELLEES'

MOTION TO VACATE STAY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	U.S. SUPREME COURT DOCKET NO. 85-766
v.	
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR. Appellees	U.S. COURT OF APPEALS DOCKET NO. 85-7011

STATE OF CONNECTICUT:
ss. August 8, 1986
COUNTY OF HARTFORD :

AFFIDAVIT OF ALBERT P. LENGE, ELECTIONS ATTORNEY AND DIRECTOR OF ELECTIONS FOR THE STATE OF CONNECTICUT

Affidavit

I, Albert P. Lenge, being duly sworn, hereby depose and say as follows:

1. I am presently the Elections Attorney and Director of Elections for the State of Connecticut. I have served in this capacity since December, 1981. As chief legal counsel to the Secretary of the State, who is Commissioner of Elections, my duties include advising municipal election and primary officials on the proper discharge of their election and primary responsibilities and for providing legal advice on election law, upon request.

2. On April 4, 1986, I filed an affidavit in connection with a motion for stay detailing the practical difficulties with conducting a primary on September 9, 1986, under the rule adopted by the plaintiff political party. A copy of this affidavit is attached hereto and made a part hereof.

3. In my prior affidavit I indicated that there were three options at that time for towns in the instance where there were certain "dual electorate" Republican primaries in which unaffiliated voters could vote for certain offices but not for others on the same ballot -- use of "programmed voting machines" and the "exterior latch," use of separate machines, or use of paper ballots. Each was shown to have administrative difficulties.

4. Should this Court order the stay lifted now, in my opinion it is too late (with the primary in less than five weeks' time) to choose any course except the establishment of separate voting machines. This best available alternative would still, in my judgment, create an unacceptably high risk of mistakes by

primary officials together with voter confusion, a serious administrative burden on the State and the towns, disruptive potential for the upcoming September 9, 1986 primaries, and the possibility of voting machine shortages, hence extra expense as set forth in my prior affidavit, paragraph 7.

As I stated in my previous Affidavit, one of the major reasons why the Republican Party Rule would cause serious administrative problems for the state and its towns in carrying out primary elections is that, under the Rule, voter qualifications would differ from office to office. Unaffiliated voters could vote for governor, U.S. Congress, and certain additional offices, but not for general assembly, probate judge or other offices.

5. As of August 7, 1986, based on filings with, or information given to, our office, Republican primaries are scheduled for at least the following offices: Governor; Lieutenant Governor; State Senator, Districts 25 and 26; State Representative, Districts 141 and 142; Judge of Probate, Districts of Newington, Westport, and Woodbridge. Under the rule, unaffiliated voters may vote for Governor and for Lieutenant Governor, but not for the other offices. The primaries scheduled thus far for such other offices involve 12 towns and a portion of a 13th, with a total (as of October 15, 1985) of 62,787 Republicans (who may vote for all offices being primaried), 48,572 unaffiliated voters (who may vote for Governor and Lieutenant Governor only), and 55 voting

districts. The number of such "dual electorate" towns and voters is likely to increase as we are notified of additional Republican primaries. Such notifications may be received as late as the latter part of August in the case of single-town-office primaries (e.g., State Representative in the 82 single-town assembly districts).

6. As of August 7, 1986 based on filings with, or information given to, this office, Democratic primaries are scheduled for at least the following offices: Treasurer; Congress in Districts 5 and 6; Sheriff in Fairfield, Hartford, and Tolland Counties; State Senator, District 19; State Representative, Districts 32, 47, 48, 66, 76 and 105; Judge of Probate, Districts of Thompson and Winchester; Registrar of Voters, Town of Middlebury. The number of

Democratic primaries for non-statewide offices is also likely to increase as additional notifications are received. The Treasurer primary would affect all 169 towns. The other Democratic primaries scheduled thus far affect 118 towns and a portion of one other. Such 118 towns include 12 of the 13 "dual electorate" Republican primary towns indicated in 5 above. Hence in those 12 towns there will be three classes of voters, each with a different voting eligibility: 60,982 Republicans, 46,227 unaffiliated voters, and 51,259 Democrats (October 1985 figures). These "triple electorate" numbers may increase as additional primary notifications are received.

7. In addition to the problems with absentee ballots detailed in paragraph 9 of

my prior affidavit, I would indicate that since there is a statewide Republican primary for governor and lieutenant governor and under the party rule unaffiliated voters will be entitled to participate, there is a possibility that there will be a shortage of absentee ballot materials ordered on or about September, 1985 for distribution to the towns this year. All of these materials have been distributed to the 169 Connecticut municipalities as of this time.

Based on a partial survey conducted by our office and information on file with us, it is also a virtual certainty that there will not be enough voting machines for some of the 13 or more towns where there will be different Republican primaries with different voting

qualifications under the Party rule. This is because separate voting machines with only partial ballots will be needed for unaffiliated voters. Shortages or increased existing shortages may also occur in other towns due to the Party "rule." Whether there will be enough machines can not be known by this office. In all other towns a greater number of the town's machines than used under current law will be needed to accomodate unaffiliated voters, which will significantly increase the cost of administering this primary election in every Connecticut town.

8. Further, the Towns will have to expend extra funds to print additional ballots and checklists as set forth in paragraph 10 of my prior affidavit.

9. There is a need for the training of registrars and moderators in the conduct of the primary under the party rule. This office would want to hold at least four registrars' conferences and ten moderators' conferences to indicate the proper procedures in the conduct of the primary, including such matters as ineligible voters, newly-disaffiliated Democrats, and the completion of moderator's returns. There is insufficient time, because of other duties directly related to the September 9, 1986, primary, to schedule and hold these conferences at this time.

10. The lifting of the stay less than five weeks before the primary, when the legislature is no longer in session, does not allow time for the needed statutory modifications to the election laws,

although legislative changes would be insufficient to deal with all of the practical problems posed by the Party "rule."

11. The plaintiffs have known or should have known for a long time, that there were at least four candidates seeking the nomination of the party for the office of Governor and that a primary was thus a reasonable possibility if any challenger obtained at least 20% of the convention vote. In this regard, campaign disclosure forms were filed in the Secretary of the State's office by individuals affiliated with the Republican Party and seeking the office of Governor, on the following dates:

September 10, 1985; September 23, 1985, November 12, 1985 and January 7, 1986. There was also a Republican delegate

primary for Governor in Stamford, held on May 20, 1986, in which there were three competing slates of candidates for delagates. In addition, a Republican caucus for Governor was held in Fairfield on April 1, 1986.

12. After the stay had been granted by the Second Circuit, on April 17, 1986 this office ordered 10,000 copies of our procedure manual for counting absentee ballots as stated in my previous affidavit and 5,000 copies of our moderator's handbook for elections and primaries, which it is now distributing to every Connecticut town in sufficient quantities. These volumes will have to be corrected and reissued at an expense to the State, if the stay is lifted now. The agency does not have the resources to adequately make this

revision in the remaining time period and to distribute revised booklets, which take several weeks to print and many days to assemble, package, address and distribute by mail.

13. If the stay that was granted by the Second Circuit were now removed, I believe that there is insufficient time to make the necessary adjustments to the many involved procedures for administering primary elections--procedures designed to reduce error and produce an accurate outcome--and this insufficiency would create an unacceptably high risk of error by primary officials which, depending on the closeness of the vote and the incidence of error, may place the outcome in dispute.

14. Contrary to paragraphs 3 and 4 of the affidavit of Dorothy Turnrose, the

set-up of the voting machines involves more than stripping the old ballot from the machine, clearing the machine's vote totals and putting the new ballot for the primary in place. For example, programming the primary lever alluded to in paragraph 8 of Ms. Turnrose's affidavit, resulted in the jamming of the Secretary of the State's lever voting machine for over an hour by two of the voting machine mechanics used by the Secretary of the State to train and certify voting machine mechanics throughout the state. An entire morning was unsuccessfully spent by myself, two attorneys and the foregoing mechanics attempting to learn how to program such primary lever under the system proposed by Ms. Turnrose. Thus, activation of this primary lever will, contrary to Ms.

Turnrose's statement, most certainly delay the set-up process of the voting machines.

15. Contrary to Ms. Turnrose's statements in paragraphs 5 and 6 of her affidavit, it is highly likely, as previously stated, that some towns will be short the statutorily required number of voting machines needed to be used in the event of an "open primary", that is, a party primary with eligibility extended to unaffiliated electors.

16. Contrary to paragraph 10 of Ms. Turnrose's affidavit, there are serious difficulties associated with an open primary and the lack of adequate planning time. For example:

a) absentee ballot application forms, already distributed to the town clerks in the thousands, have no place to

indicate thereon that the clerk mailed a partial ballot to a voter;

b) instructions for configurating and printing ballots, already sent to the clerks, do not include partial ballots and provisions for either color coding the same or printing additional information thereon --necessary to distinguish between Republicans and Unaffiliateds under the Party "rule" and to reduce clerical error;

c) There is a high probability of insufficient voting machines in some towns, as stated earlier, necessitating lease arrangements or the printing of emergency absentee ballots;

d) There are inadequate provisions for substituting a full ballot for a partial ballot in the event that an

unaffiliated elector becomes an enrolled Republican by 12:00 noon the day before the primary--an enrollment privilege that is currently the right of all such persons under Connecticut statute;

e) There are inadequate provisions for identifying electors entitled to vote only a partial ballot inside a polling place on primary day.

f) Most importantly, there is inadequate time to train election officials and workers on how to follow the Party "rule" instead of State law.

17. Contrary to paragraph 7 of the affidavit of Heather Danaher, there will be a substantial number of unaffiliated voters added to the existing Republican voter base should the stay previously granted by the Second Circuit be dissolved. For example,

in the 13 towns now known to be having Republican primaries in which, under the current Republican Party rule, unaffiliated electors will not be permitted to vote for all offices being primaried, approximately 48,572 unaffiliated electors will be added to the Republican voter base for the offices of Governor/Lieutenant Governor only--a 77.4% increase. Statewide, this will add approximately 581,268 unaffiliated electors -- or a 125.9% increase over current Republican enrollment figures, based on the most recent data filed with this office.

What this means is that even those towns which will not have conflicting voter qualifications under the Party "rule" will still have to have many more machines, more trained poll workers, more voting lists and more absentee ballot materials.

18. In summary, to vacate the stay at this time would in my opinion have a disruptive potential for next month's primary and a serious administrative burden on the State and towns and also greatly increase the possibility of voter confusion and voting mistakes. Depending upon the incidence of error and the closeness of vote margins, it could put the outcome of some of the primaries in doubt.

19. This affidavit is true and correct to the best of my knowledge, information and belief.

/s/ Albert P. Lenge
Albert P. Lenge

(Jurat omitted in printing)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	U.S. SUPREME COURT DOCKET NO. 85-766
v.	
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR. Appellees	U.S. COURT OF APPEALS DOCKET NO. 85-7011

STATE OF CONNECTICUT:
ss. August 21, 1986
COUNTY OF HARTFORD :

SUPPLEMENTAL AFFIDAVIT OF ALBERT P. LENGE, ELECTIONS ATTORNEY AND DIRECTOR OF ELECTIONS FOR THE STATE OF CONNECTICUT

Affidavit

I, Albert P. Lenge, being duly sworn, hereby depose and say as follows:

1. I wish to update my Affidavit of August 8, 1986 detailing the practical difficulties with conducting a primary on September 9, 1986, under the rule adopted by the plaintiff political party.

2. The challenging candidates in Democratic primaries for State Treasurer, and Sheriffs for Fairfield, Hartford and Tolland Counties have withdrawn. We received the Fairfield County withdrawal yesterday, August 20, 1986. However, as of this date there are still Democratic primaries scheduled in 90 of the 169 towns in Connecticut on September 9, 1986. This will still require a substantial number of voting machines, although not as many as indicated in the original affidavits.

3. The number of Republican towns with primaries involving conflicting voter

qualifications under the Party "rule" has now been increased from 13 to 15, with the addition of Hamden (Registrar of Voters primary) and East Lyme (Judge of Probate primary). By conflicting voter qualifications, I mean that in all these towns there will be Republicans who will be able to vote for all offices, while under the party "rule" unaffiliateds could vote for only some of them, i.e., Governor and Lieutenant Governor. The election officials would actually have to administer two sets of Republican primaries with different voter qualifications, with the difficulties that I described in my original Affidavit. This will occur throughout <u>all</u> of 14 of these towns, and in part of the remaining one (Stamford).

4. The number of voters (based on the statistics most recently filed with this office) that will be subject to these conflicting voter qualifications under the "rule," if that rule is now to be enforced, has increased from 62,787 to 72,319 Republicans and from 48,572 to 66,759 unaffiliated voters because of the primaries in East Lyme and Hamden. The number of voting districts has been increased from 55 to 68.

5. In four of these towns (Redding, Ridgefield, Weston and Wilton) and part of a fifth (Norwalk), there will also be Democratic primaries, thus creating possible shortages of voting machines in these areas.

6. In addition, today, August 21, 1986, absentee ballots must be available

for distribution by town clerks to applicants by virtue of Conn. Gen. Stat. § 9-133b. In the fifteen towns where there will be conflicting voter qualifications under the "rule," the ballots for Republican voters cannot be used for unaffiliateds, because those ballots have non-statewide offices for which unaffiliateds cannot vote under that rule. This means that new ballots would now have to be printed and issued. Not only would this result in increased expense for the towns as well as time and effort, but it also means that unaffiliated absentee voters would not get their ballots in time under the State law, if they got them at all, given the time required for printing and distribution. Many more absentee ballots would also be needed in other towns

as well because of the influx of unaffiliateds at this late stage.

7. In summary, while there will be more voting machines available than originally indicated, the number of towns that would have to deal with conflicting voter qualifications has actually increased. This is greatly compounded by the absentee ballot problem discussed above.

Most important, there is even less time for all towns in Connecticut to recruit and train the necessary primary election workers. This problem will be aggravated in the 15 towns with conflicting voter qualifications, but it will also exist in all other towns because of the need to accommodate the 125.9% increase in the potential statewide Republican primary

electorate due to the admission of unaffiliated voters.

There is less than three weeks remaining until the September 9, 1986 primary. To require the State and its towns to follow the party "rule" instead of state law at this time would in my opinion create a serious and major administrative burden, together with a greatly increased risk of voter confusion and election mistakes.

/s/ Albert P. Lenge
Albert P. Lenge

(Jurat omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	:U.S. SUPREME COURT :DOCKET NO. 85-766
v.	:
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR. Appellees.	:U.S. COURT OF APPEALS :DOCKET NO. 85-7011

STATE OF CONNECTICUT:
COUNTY OF HARTFORD : AUGUST 7, 1986

AFFIDAVIT OF JOSEPH L. GRACEY, JR.

I, Joseph L. Gracey Jr., being duly sworn hereby depose and say:

1. I have been a voting machine mechanic for the Town of Waterford, Connecticut, from 1972 through 1984.

Additionally, for the past three years I have been a voting machine mechanics instructor for the Secretary of the State. Most recently I instructed voting machine examiners for certification purposes for the Secretary of the State's Office. Over the years I have attended various Automatic Voting Machine Company training courses given by the voting machine manufacturer.

2. In addition, much of my adult life has been spent in dealing with on-job-training, as a vocational instructor in the U.S. Navy and as a training/program manager for apprenticeship in the Connecticut Department of Labor.

3. I have read the Affidavits of Dorothy R. Turnrose and Heather L. Danaher which were shown to me by the Attorney General's Office.

4. The use of the primary lever and/or the Restricted Office Lever to restrict on a voter by voter basis the offices for which a voter may vote is certainly possible, since the automatic voting machine has these capabilities.

5. However, I have never had to set-up either of these mechanisms in my work as a voting machine mechanic, nor do I know of any voting machine mechanics in Connecticut who have done so.

6. Therefore, in my opinion, I would require instruction by an expert on how to set-up and test these two mechanisms.

7. As a voting machine instructor (under contract with the Office of the Secretary of the State) who instructs and tests voting machine mechanics I believe

that the voting machine mechanics would require thorough instruction on how to set-up and test these two mechanisms.

8. Additionally, election officials and workers (including the machine tenders) will require thorough instruction on procedures for voter use of these features.

These people will also need this training because having the same machine service more than one class of voters, some of whom would be voting for different offices, would require the machine tender to align the machine properly every time the voter enters the booth. The alignment would have to depend on whether the voter was Republican or Unaffiliated, and the voter must somehow be identified as such to the machine tender.

In my experience, even the present system requires constant supervision by election officials for the machine tenders to perform their jobs correctly. The process Ms. Turnrose described would now require additional duties, i.e., positioning the primary or restrictive office lever the right way every time the voter came to vote.

9. In my opinion, there is not time between now and the date of the primary to accomplish the necessary instructions for myself and the voting machine mechanics, election officials and workers to carry out what Ms. Turnrose calls the "Republican Party's open primary rule" as stated in her Affidavit (Paragraph 4, p.2) and that of Heather Danaher in the twelve (12) cities and towns referred to in those Affidavits.

10. In addition, if the Restricted Office Lever is to be utilized in a primary, each affected municipality must purchase an adequate supply of a part called a "yoke" in order to set-up this mechanism. In my experience, no municipalities presently have any of these yokes.

11. In her Affidavit Ms. Turnrose states: "Such set-up by the mechanic involves stripping the old ballot from the machine, clearing the machine's vote totals and putting the new ballot for the primary in place on the machine." Page 2, Paragraph 3.

Setting-up the machine involves more than this. The machine must be mechanically prepared to accept the new

ballot. The mechanic must cover the questions, write-in slides, party levers, and the unused candidate pointers. The mechanic must install all grouping pins to allow the voter to vote office by office instead of by grouped office, such as Board of Finance. The mechanic must also make sure that the machine is in sound operable condition.

12. After this is done the mechanic must test vote the machine. Then election officials and necessary party representatives also test vote the machine prior to installation of seals. After zeroing the machine, to clear it of the test votes, the mechanic seals the machine and turns the keys over to the election officials.

13. All the steps which I have described in the above paragraph would have to be done anyway even without the "open primary rule," referred to by Ms. Turnrose (Paragraph 4, p.2). Ms. Turnrose later states: "Depending upon the extent to which the machine's old ballot must be stripped, set-up of any additional machine needed to implement the open primary for the 1986 governor-lieutenant governor primary can be accomplished within thirty to forty-five minutes per machine". (Paragraph 4, pp.2-3). There may be mechanics who would take only this amount of time. However, I allow myself an average of one hour per machine. Additional time would be required to set-up and test the primary lever and/ or restricted office lever mechanisms in those

municipalities where unaffiliated voters could vote in the Republican primary for Governor and Lieutenant Governor, but not in the other Republican primaries, such as for State Representative.

14. Ms. Turnrose in her affidavit states: "I believe that there are no administrative difficulties which would reasonably prevent implementation of an open primary for governor-lieutenant governor in combination with the six local primaries." (Paragraph 10, p.5).

I do not believe that this is correct. I believe that there will be administrative difficulties because of the need to coordinate, schedule and deliver instruction to voting machine mechanics, election officials and workers in the time remaining for the September 9th primary.

15. The above is accurate and true to the best of my knowledge, information and belief.

_____

Joseph L. Gracey, Jr.

(Jurat omitted in printing)

UNITED STATES SUPREME COURT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	:U.S. SUPREME COURT :DOCKET NO. 85-766
v.	:
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR. Appellees.	:U.S. COURT OF APPEALS :DOCKET NO. 85-7011

AFFIDAVIT OF ANN D. ARTEL
REPUBLICAN REGISTRAR OF VOTERS
FOR THE CITY OF NORWALK, CONNECTICUT

I, ANN D. ARTELL, being duly sworn, hereby depose and say:

1. I am the Republican Registrar of Voters for Norwalk, Connecticut. I have served in this position since 1977. Before that, I was a volunteer worker in the Norwalk Registrar's Office for about four

years. I have also served as Vice Chairman of the Republican Town Committee in Norwalk for eight years. I am now Republican District Chairman of District A.

2. If we are required to follow the Republican Party Rule which allows unaffiliated voters to vote in some, but not all, Republican primaries, then we will have serious difficulties in administering the Primary scheduled for September 9, 1986.

3. In that primary election, there will be Republican primaries for Governor and Lieutenant Governor, in which unaffiliated voters must be allowed to vote under the Party Rule. However, there will also be a Republican primary for the 25th State Senatorial District in which unaffiliated voters could not vote under

that rule. In addition, there will also be a Democratic Primary for High Sheriff of Fairfield County in which our city is located. I have been informed by the Secretary of State's Office that a Democratic primary for State Treasurer may also be held. Unaffiliated voters could not vote in those Democratic primaries.

4. More voters are unaffiliated in Norwalk than belong to any other party. Our breakdown, as of July 1, 1986, is as follows:

Republican	10,465
Unaffiliated	15,428
Democrat	14,442
Conservative	117
Independent Party	812
Total	41,264

We also have 12 voting districts.

5. If the Court requires us to enforce the Party Rule at this late date, then in my opinion, the only realistic way

this could be done if it could be done at all, would be by having separate machines for unaffiliated voters. The other alternatives are either setting up the machines with different ballots for both Republican and unaffiliated voters on the same machine or instead have paper ballots. These last two are just not workable from a practical standpoint. There will be too much possibility of mistakes and breakdown.

6. However, using separate machines would also be very difficult. First, we would not have enough machines. 21 machines would be required for the Democratic Primary and 46 voting machines would be needed for the Republicans and unaffiliated voters. This would total 67 voting machines. We only have 58 machines

and would, therefore, be 9 machines short. Each machine costs approximately $3,000.00. We also have to remember that other towns will be holding Republican and Democratic primaries and some towns might have to deal with the dual voter qualifications. For the Republican Primary, therefore, I do not believe it would be easy, to say the least, for us to borrow additional machines from other towns.

7. There is also a very real problem in having enough <u>properly trained</u> poll workers. I estimate that we would need 19 additional voting machines to serve the unaffiliated voters. This would require 19 more machine tenders. In addition, 12 more checkers would be needed to man special tables for the unaffiliated voters. In my opinion, 6 more moderators would also be needed.

This also would involve an additional expense of over $2,100. This does not include extra compensation that would be needed for the training session.

We are on a very tight budget in our office and our city has just had a 10% tax increase. Therefore, our city would have to face an additional financial burden which would not be well received.

8. The most serious problem, however, would be getting these workers properly trained. Just today, I am sending out letters to the prospective new moderators that we have managed to retain for the September 9, 1986 primary, notifying them of a training session in New Haven on August 14, 1986. If we now have to hire 19 more machine tenders, 6 more moderators, and 12 more checkers, or a total of 37

additional workers, there will hardly be time for them to get the training that is absolutely necessary.

9. In stating that 37 more workers would be needed, I also did not make allowance for additional workers who would have to make sure that the unaffiliated and Republican voters stay in different voting lines for the different machines. I cannot say for sure exactly how many would be needed but I would estimate at least 12, based on one person per voting district.

10. Another additional burden that would fall on our office would be preparing 12 extra voter registration books containing separate lists for the unaffiliated voters.

11. While we serve voters of all parties as well as unaffiliated voters in a

general election, the primary would present very real difficulties under the Party Rule that would not be present at a general election. This involves, as stated earlier, separate voting machines with separate ballots, separate checking tables and separate voting lines for the unaffiliated voters.

12. To sum up, if the Court allows unaffiliated voters to vote in the Republican Primary and requires us to enforce the Republican Party Rule, serious administrative problems would be created. These would include which lines the voters go to, errors in checking off the right names and voters going into the lines without being checked off properly.

If we use the same machines, it would also be confusing and unfair.

If we use separate machines, we would not have enough equipment. In addition, it is very difficult to find enough poll workers. Some would be away on vacation, especially during the important training period, and others would be taking their children back to school. It is difficult enough as it is to get the necessary people because the pay is not that high.

If we were notified back in March that the Party Rule would have to be obeyed by the towns, then we could have at least prepared for it in time. For this Rule now to be enforced would be a shock to our budget process and would also create very difficult problems in administering the Primary Election the right way.

13. The above is accurate and true to the best of my knowledge, information and belief.

_____

Ann D. Artel

(Jurat Omitted in Printing)

UNITED STATES SUPREME COURT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	U.S. SUPREME COURT DOCKET NO. 85-766
v.	U.S. COURT OF APPEALS
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR. Appellees	DOCKET NO. 85-7011

STATE OF CONNECTICUT)

COUNTY OF FAIRFIELD)

I, Carolyn, D. Miller, being duly sworn, depose and say:

1. I am the Republican Registrar of Voters for Darien, Connecticut. I have served in this position for eight years.

Prior to that, I was Deputy Republican Registrar. I also worked in many elections prior to becoming Deputy.

2. The possibility of three primaries on September 9th, presents every Registrar in every Connecticut town with enormous administrative problems, some common to all towns and some unique to individual towns.

3. In my town, there will be a Republican Primary for Governor in which unaffiliated voters could vote under Party rule. We will also have a Republican Primary for State Representative for the 141st District as well as for the Board of Education in which unaffiliated voters could not vote under Party rule. In addition, three voting districts will have

a Republican Primary for the 25th State Senatorial District. There will also be a Democratic Primary for High Sheriff in my county (Fairfield). An additional Democratic Primary for Treasurer has been qualified for, according to the Secretary of the State.

4. For Darien, the most immediate and serious problem is the lack of voting machines. The Town has exactly the number of machines required to conduct a two party primary. Should the court allow unaffiliated voters to participate in the Republican Primary, six additional machines would be needed to comply with current statutes. With every town in Connecticut conducting both Democratic and Republican primaries on September 9th, renting or borrowing voting machines from other towns

would not be possible. Therefore, Darien would not meet the requirements of section 9-238.

5. Should the court rule in favor of an open primary, I would suggest that this same court either require the State to conduct the primaries at least fifteen (15) days apart or, require the State to allow the use of the party primary device within each machine. While both solutions are possible, current statutes do not allow for their implementation.

6. It has been my experience, over the last thirteen years in office, that the hurried enactment of changes in the election process leads not only to widespread voter confusion but also to poorly conducted elections.

This affidavit is true and correct to the best of my knowledge, information, and belief.

/s/ Carolyn D. Miller
Republican Registrar of Voters

(Jurat omitted in printing)

UNITED STATES SUPREME COURT

JULIA H. TASHJIAN, Secretary of the State of Connecticut Appellant,	:U.S. SUPREME COURT :DOCKET NO. 85-766
v.	:
REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR. STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE,JR: Appellees.	:U.S. COURT OF APPEALS :DOCKET NO. 85-7011

AFFIDAVIT OF JAMES W. LaVERSA,
REPUBLICAN REGISTRAR OF VOTERS
FOR THE TOWN OF GREENWICH, CONNECTICUT.

I, JAMES W. LaVERSA, being duly sworn, hereby depose and say:

1. I am the Republican Registrar of Voters for the Town of Greenwich, Connecticut. I am completing my fourth year in this position. I have also been a member of the Republican Town Committee for

Greenwich since 1974, and have served as a District Leader. I have worked in various elections as a party worker. I serve as Registrar of Voters on a part-time basis. My other profession is that of physical therapist.

2. I have heard that there may be an effort to remove the stay that has been granted in this case, and to require that the Republican Party Rule, permitting unaffiliated voters to vote in certain Republican primaries, be enforced by the State and the towns for the primary scheduled for September 9, 1986.

3. If the Party Rule is required to be enforced, then I believe this would cause difficult problems for our town primary elections. There are a total of 37,286 registered voters in Greenwich. Of

these, there are 17,860 Republicans, 12,137 Unaffiliates and 7,289 Democrats. Thus, 80% of the electorate, namely Republicans together with Unaffiliates, would be eligible to vote in the Republican Primary under the Party Rule. This would, in my opinion, double the cost of the Primary. The largest single cost would be the need to hire additional machine tenders, checkers and challengers and aisle conductors. The aisle conductors would be needed because there could very well be a Democratic Primary at the same time. Many more voting machines would be necessary. Although these would probably be available in my town, this would also involve greater effort and expense. Without the Party Rule, 30 to 32 machines would have to be programmed and set up. This number would

be increased to 58, or almost double, under the Party Rule.

4. In addition, more moderators and counters would be needed to tabulate the absentee ballots. An additional source of expense would be not only printing more ballots but also printing the unaffilliated voter lists.

5. In addition to the greatly increased expense, there would also be other administrative problems as well. During the General Elections, the polls are open for 14 hours, from 6 a.m. to 8 p.m. Under existing State law, however, the hours for voting are reduced to 8 hours for a Primary from 12 noon to 8 p.m. Thus, many more persons--in the case of Republican Primary comprising 80% of the electorate-- would have to vote in a reduced period of time.

6. I also anticipate more voter confusion under the Republican Party rule. In some of the states where unaffiliated voters can vote in a primary, those voters can also vote in either the Republican or Democratic Primary. It is certainly foreseeable that some of the unaffiliated voters voting in our town might also be under the same impression, and we will have to make sure that they vote only in the Republican Primary.

7. There are only approximately six weeks before the September 9, 1986 Primary. Thus, the increased burdens on our office such as programming almost twice as many machines, hiring twice as many personnel and providing the special training, all would have to be done under difficult time constraints.

8. I believe that it is an unfair and unreasonable imposition on our town and our office to have to enforce a Party Rule when the U.S. Supreme Court has not yet decided this case. If we have to obey the Party rule for the upcoming primary, and the Supreme Court then decides that the State law, not the Party Rule, should be followed, we will have to go through a completely new set of procedures for this September Primary only to have them changed again afterwards.

9. I also should note that I am giving this Affidavit on the basis that there will be no other Republican Primaries in our town. Thus the same machines and ballots could be used for Republican and Unaffiliated Voters, since the voting qualifications would be the same. In other

towns, however, there will be Republican Primaries in which Unaffiliated Voters could not vote (such as for General Assembly or Probate Judge), together with Republican Primaries in which those voters could vote. I would expect that the administrative problems would be greatly increased, especially in view of the relatively short time there is for those towns to prepare for that situation.

10. The above is accurate and true to the best of my knowledge and belief.

James W. LaVersa

(Jurat Omitted in Printing)

ORDER OF COURT OF APPEALS
DENYING PLAINTIFF-APPELLEES'
MOTION TO VACATE STAY

UNITED STATES COURT OF APPEALS
THE SECOND CIRCUIT

Republican Party of the State of Connecticut,et al : 85-7011

v.

Julia Tashjian

IT IS HEREBY ORDERED that the motion be and it hereby is denied

UNITED STATES COURT OF APPEALS
FILED
AUGUST 21, 1986
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

/s/
Irving R. Kaufman

/s/
James L. Oakes

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-766

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MAINE, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE AND WYOMING IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States
October Term, 1985

No. 85-766

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
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v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MAINE, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE AND WYOMING IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTEREST OF AMICI CURIAE

Amici Curiae States submit this brief pursuant to Rule 36 in support of the Jurisdictional Statement of the State of Connecticut.

Certain of the Amici[1/] have similar statutes to Connecticut's in that enrollment with a political party is a requirement to vote in primary election contests. The majority of the States have such statutes. These state statutes are

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1/ See, e.g., Ariz. R.S. § 16-467; 21-A Me. R.S.A. § 143; N.Y. El. L. § 8-302.4; N.C. Gen. Stat. § 163-59; Tit. 26 Okla. Stat. § 1-104; Wyo. El. Codes § 22-5-212.

directly threatened by the ruling of the Second Circuit.

Other Amici[2/] do not require party enrollment to participate in primaries. Nonetheless, the holding of the Second Circuit will have a significant effect on the election statutes of those states because it calls in question virtually any attempt by a State to regulate the primary process. All States that do provide for open primaries do so by statute. The logic of the Second Circuit opinion would invalidate these statutes any time a political party were to adopt a party rule inconsistent with such statutes.

2/ See, e.g., La. R.S. § 18:401 et seq.; N.D. Cent. Code § 16. 1-11-22.

Indeed, to our knowledge, not a single state in the nation leaves eligibility for voting in primaries to the discretion of the political parties--which is the result to which the Court of Appeals decision leads.

This Court should note probable jurisdiction and grant plenary review to resolve the Amici States' authority to regulate the nomination process. As both the Second Circuit and the District Court in this case recognized, the issues in this litigation have profound implications for electoral regulation nationally. Plenary review by this Court is particularly important at this time because

the nature of electoral regulation, and particularly election schedules, does not afford the States any latitude for continued uncertainty.

Summary of the Argument

The Second Circuit holding, which gives political parties the authority to establish voter qualifications even where there is a contradictory state statute, flies in the face of numerous precedents of this Court and other federal courts. The states, through their legislative and executive branches, have traditionally been allowed to determine primary voting requirements. The holding below threatens not only the power of states to

regulate eligibility requirements, but also their power to control any other nomination procedures, even a requirement that primary elections be held at all.

Moreover, the Court of Appeals has seriously misinterpreted two significant holdings of this Court on associational rights--Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981), and Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984). The Second Circuit has extended the associational rights recognized in these cases to illogical extremes that endanger the integrity of the electoral process and that will create chaos rather than order in elections.

Cf. Storer v. Brown, 415 U.S. 724, 730 (1974). The critical issues regarding election administration raised by this case should be resolved prior to the next federal elections in 1986.

ARGUMENT

1. The issue raised by Connecticut's jurisdictional statement is not one unique to Connecticut. It is not a partisan issue, nor does it cast this Court into the perennial political science dispute between the advocates of "open" and "closed" primaries. Simply put, the constitutional right of the states to regulate the party nomination process is at stake.

The Second Circuit concluded (J.S. App. 98) that "the selection of candidates by a political party is a function that properly falls to the party and not the state." Under the opinion of the Court of Appeals, where a party rule contradicts a state statute, in this area the party rule prevails. As set forth in the Addendum to this brief, every state regulates the issue of who is eligible to vote in a primary. Each state's election laws are, therefore, subject to being invalidated under the Second Circuit's holding. In addition, the extraordinarily wide sweep of the decision places in jeopardy the efforts of the States to regulate the mechanics of the petition

process, campaign financing of nominations, and the statutory requirement to conduct a primary in the first instance.

The Second Circuit's holding contradicts clearly established precedent regarding the role of states in regulating primaries. The leading case of Nader v. Schaffer, 417 F.Supp. 837 (D.Conn.) (three-judge court), aff'd mem., 426 U.S. 789 (1976) declared correctly that "[e]ach state legislature chooses the primary election scheme that it thinks will best promote democratic, electoral and governmental goals," 417 F.Supp at 843. Nader affirms that a state has an interest beyond that of the parties and

broad discretion in formulating primary election policies. Id. at 845, 850. See also Tansley v. Grasso, 315 F.Supp. 513, 519 (D.Conn. 1970) (three-judge court) (upholding statutory "20% rule" to conduct a primary).

More generally, this Court has consistently noted the "legitimate and valid" role of the states in regulating the electoral process. Rosario v. Rockefeller, 410 U.S 752, 761 (1973). Indeed, as the Court declared in Storer v. Brown, 415 U.S. 724, 730 (1974):

> [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the

> time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.... (Emphasis added).

See also Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (state's important regulatory interests are "generally sufficient to justify reasonable, nondiscriminatory restrictions" on a variety of voting rights); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (this Court applied a "not unreasonable" standard in upholding an election statute against a substantial

constitutional challenge); Marchioro v. Chaney, 442 U.S. 191 (1979) (statute upheld despite contrary party rule). 3/

Disregarding this precedent, the Second Circuit has held that a state's right to control a publicly sponsored and

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3/ The Court has indicated the constitutional underpinings of this deference to state authority rest in Art.I, § 4 and the Tenth Amendment. See Storer, at 729-730; Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8 (1982). Garcia v. San Antonio Metro Transit Authority, 105 S.Ct. 1005 (1985) in overruling National League of Cities v. Usery, 426 U.S. 833 (1976) particularly relied upon the "States' residuary and inviolable sovereignty," derived from the Constitution's election provisions as the States' primary source of protection from overreaching by the federal government.

funded[4/] primary is nullified in the face of the contrary rule of a political party. This holding will create disorder and confusion in enforcement of election laws. Legitimate, non-discriminatory statutes will be perennially subject to the shifting views of political coalitions. The stability favored by Storer and Anderson will be jeopardized.

4/ The ballot preference and expenditure elements of the primary process for the major parties certainly justify state control of the process. As Justice Holmes observed when a Massachusetts judge in a preferential ballot access case: "The legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage." Commonwealth v. Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902).

2. The holding of the Second Circuit conflicts with two recent decisions of this Court and requires clarification. The Second Circuit states that Democratic Party of the United States v. Wisconsin, ex rel. LaFollette, 450 U.S 107 (1981) supports the proposition that "a state may not interfere with the associational rights enjoyed by political parties and their adherents." (J.S. App. at 96). That case simply cannot be read for such a proposition.

The Court in Democratic Party relied centrally on Cousins v. Wigoda, 419 U.S. 477 (1975), which was decided "in the context of the selection of delegates to

the National Convention." 450 U.S. at 121. The Democratic Party Court made very clear that the issue in that case was extraterritoriality-- the effect of a Wisconsin statute on a national party. The Court made explicit that Wisconsin's authority to regulate state parties was not in question. 450 U.S. at 120 and n. 21.

In Cousins, the Court stated that selection of delegates to national conventions could not be left to the law of each state. "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in

the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves coalitions cutting across state lines." Id., 490. (Emphasis added) "[T]he pervasive national interest" had to prevail. Id.

Justice Powell in Cousins, concurring and dissenting in part, but on an undisputed point, noted: "I also agree with the Court that this case intimates no views regarding other efforts to regulate party conventions. Congressional regulations of national conventions or state regulation of primaries or conventions for state office raises different considerations requiring a wholly different balance." Id, 497,* note.

See also Rotunda, "Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda," 53 Tex.L.Rev. 935, 963 (1975); Novak, Rotunda and Young, Constitutional Law, (2d ed., 1983) at 786 ("...a state may not attempt, as it did in Wigoda, an extraterritorial extension of state jurisdiction to enforce otherwise valid laws"); Note, "State Regulation of National Parties," 95 Har.L.Rev. 241, 249-250 (1981); Rotunda letter, J.S. App. 239. The approach of the Second Circuit is thus inconsistent with the prior decisions of this Court.[5/]

5/ See also Bellotti v. Connolly, 460 U.S. 1057 at 1063 (1983), in which

(footnote cont'd)

The Second Circuit has improperly made use of Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984) in equating the political parties to associations (such as the family) constituting an "intimate human relationship." (J.S. App. 72). Indeed, it stretches credulity that a political party could be so characterized. Prior court decisions have treated the political parties in the nominating process as quasi-public bodies, representing "the 'state' in action."

(footnote cont'd from previous page)

Justice Stevens in dissent recognized that both Democratic Party and Cousins solely concerned the extraterritorial issue.

Lynch v. Torquato, 343 F.2d 370, 373 (3rd Cir. 1965). This case represents an opportunity to clarify the holding of the Roberts with respect to the associational rights of political parties.

3. The extraordinary views of the Court of Appeals with respect to associational rights are reflected in its characterization of the burden imposed upon Connecticut law as being so great as to require the State to demonstrate a compelling state interest to justify that burden. The only "burden" imposed by Connecticut law is that someone who wishes to vote in a primary election of a party register with that party up to the day before the election.

Compare this "burden"--imposed on people who, by definition, elect not to associate with a party through affiliation--with that in Rosario by a person who wanted to participate in a primary, but could not because he resided in New York for less than eleven months. This Court found that much greater burden in Rosario to be insufficient to trigger a compelling interest test. See also Tribe, American Constitutional Law § 13-23 at 793: "Absent a willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being abridged; without a communality of interests, there is little association to abridge."

The rhetoric about political and associational rights underlying the Court of Appeals decision becomes little less than remarkable in light of the associational interests actually implicated by this case--interests the Court of Appeals chose not to examine critically.

The fact that the Court of Appeals could determine that an associational burden as minimal as the one at issue in this case triggers a compelling interest test is a clear and additional indication that review by this Court is essential to prevent widespread challenges to myriad, legitimate state election laws.

4. This is not a case where it is appropriate for the Court to await a conflict among the Circuits before accepting the matter for review. Election law questions often need immediate answers. This Court has addressed, for example, the constitutionality of enrollment deadlines, Rosario v. Rockfeller, to resolve this question before the next scheduled election, and where no square conflict yet existed.

This is then a classic case where there will be chaos in election administration until there is an authoritative ruling of the Court.

CONCLUSION

This Court should note probable jurisdiction.

RESPECTFULLY SUBMITTED,

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November, 1985

(Additional list of Counsel on Inside Pages)

Addendum

Types of State Primaries

According to the Book of the States (Council of State Governments, 1984), Table 9, 38 states have a "closed" primary in which voters receive only the ballot of their party choice. Voters in these primaries must declare their party affiliation on or before the day of the primary election.

Nine states have an open primary in which voters receive a ballot for all parties and select the party of their choice in the voting booth.

Two states have a blanket primary in which voters are not restricted to one party but can vote for different offices among different parties. However, they may vote only once for each office.

Alabama by statute delegates to the parties who is eligible to vote in a primary, but requires party membership to participate.

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No. 85-766

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF WILLIAM J. CIBES, JR. (Associate Professor of Government, Connecticut College), CLYDE McKEE (Professor of Political Science, Trinity College), SARAH McCALLY MOREHOUSE (Professor of Political Science, University of Connecticut at Stamford), WAYNE R. SWANSON (Professor of Government, Connecticut College), POLITICAL SCIENTISTS, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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STATEMENT OF INTEREST OF AMICI

Amici who have joined this brief are professors of political science at colleges located throughout the State of Connecticut. In that capacity, amici teach and study the political party system as it pertains to government, particularly in Connecticut, where they live and work. Because of this convergence, amici have a special insight into the party system and election process in Connecticut. Amici believe that the state legislature acts properly in regulating participation in primary elections so that those who associate with political parties are protected from those who attempt to intrude upon their association.

In addition, an author of this brief, William Cibes, is a state representative as well as an associate professor of political science. He thus brings a unique perspective to the issues facing the Court in this matter.[1]

---

[1] The parties to this appeal have consented to the filing of this brief by amici, and the consent letters are filed with this Court.

SUMMARY OF ARGUMENT

States have a legitimate interest in preventing distortion of the views held by members of a political party by barring persons who are not affliliated with a political party from voting in a state primary election of that party. The Circuit Court of Appeals has erred in finding that the State of Connecticut must demonstrate a compelling interest in legislating such a prohibition. The standard of review, as elaborated in prior decisions of this Court, is that the state must demonstrate a compelling interest in adopting a statute which burdens the freedom of association only if the statute creates a "substantial restriction" on associational rights. In the instant case, there is no severe burden on the right to associate because the state has not prevented parties from attracting new members to its ranks, it has not interfered with the internal affairs of the party by a) forcing the party to accept members it does not desire, b) regulating purely internal, non-electoral processes of the party, or c) infringing on intrinsic aspects of a completely private organization, and the regulation of the state has not had an extra-territorial reach. Because the state's actions here accordingly have not substantially restricted the freedom of association, the state need only demonstrate the legitimacy of its purpose, which it has done. Therefore, this Court should note probable jurisdiction.

ARGUMENT

I. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING PARTY MEMBERS' ASSOCIATIONAL RIGHTS AND PRESERVING THE INTEGRITY OF THE ELECTORAL PROCESS.

A. Political Science Analysis.

The very reason a political party exists is to articulate and fight for the implementation of certain public policies. Those policies, and the principles underlying them, flow from the expressed desires of members of the political party.

At the same time, a political party, the policies it espouses, and its candidates are intertwined inextricably. Candidates personify the party, and thus the selection of a candidate is one of a political party's most important functions. As E.E. Schattschneider, perhaps the foremost analyst of American political parties in this century, has said, "The nominating process thus has become the crucial process of the party. The nature of the nominating procedure determines the nature of the party; he who can make the nomination is the owner of the party." E. Schattschneider, *Party Government* 64 (1942).

Members of political parties nominate their candidates for public office either by convention or by direct primary. In some instances, a challenge primary follows a convention; such a scenario occurs in Connecticut when a candidate receives more than twenty per cent of the votes cast by the delegates to a convention, and chooses to press his candidacy further. *See* Conn. Gen. Stat. §§ 9-400, 415.

When a party chooses its candidates for a general election at a convention, it usually also adopts a platform stating its principles. That platform, on which its candidate stands, is likely to be a model desired by the leading candidate for

the party's nomination, whose supporters — members of the political party — dominate not only the nomination process, but also the process of building the platform. S. Morehouse, *State Politics, Parties and Policy* 190 (1980).

When a candidate is chosen through the mechanism of a primary election, the only political principles defended by the party are those espoused by the winner of the primary. In the case of a challenge primary, like Connecticut's, the platform adopted by the convention will have been bypassed if the winner is other than the nominee of the convention. The political principles for which the party campaigns are accordingly defined, either in a direct primary or a challenge primary, by the voters who participate in that primary.

If those participants are the same as those who associate with each other, as members of a party, for the purpose of influencing public policy in a particular way, then no problem exists. But if others, including some who have formally associated with another party, participate in that primary, and they have candidate preferences which differ from those of the members of the party that is conducting the primary election, then the principles which the members of the party favor will have been distorted by the intruders.

It is possible, in the abstract, that independents and self-declared members of party B would choose not to participate in the primary of party A, even if they were permitted to do so. And it is also possible that, since there are either no tests for party membership, or the tests are unenforceable, members of party B could dissemble and declare themselves to be members of party A and participate in party A's primary even when they supposedly were excluded. But research has found that either possibility occurs only minimally in actual practice. Political scientists Hedlund, Watts and Hedge have observed that more than forty per cent of the voters in the open Wisconsin presidential primaries from 1968 through 1980 were not members of the party in whose primary election they voted. And the same authors observed that less than

five per cent of party identifiers voted in the other party's primary in 1976 in Florida, Pennsylvania, and California, where primaries were closed. R. Hedlund, M.W. Watts, and D.M. Hedge, "Voting in an Open Primary," 10 Am. Pol. Q. 197, 201-04 (1982).

It is also possible that the candidates and thus the political principles favored by party affiliators do not differ from the candidates and political principles favored by those who do not ally themselves with the party but vote in the primary election anyway. Recent research has demonstrated, however, that results of open primaries are in fact different from the results which would occur in those elections if they had been closed to outsiders. Professor Gary Orren has concluded that Gary Hart "owed to independents his margin of victory [over Walter Mondale in the 1984 Democratic primaries] in several states that permitted independents or Republicans to pick up Democratic ballots. These included New Hampshire and Indiana, where he ran just even with Mondale among Democrats, and Ohio, where he won the primary even though he lost the Democratic vote." G. Orren, "The Nomination Process: Vicissitudes of Candidate Selection," in *The Elections of 1984* at 27, 66-67 (M. Nelson ed. 1985) (internal footnote omitted). To the extent that Hart's victories in those states made his campaign for the nomination appear more viable for a longer period of time, the expressed preferences of those voters unaffiliated with the Democratic party weakened the candidacy of the contender favored by those who were members of the association.

Similar distortions occurred in the 1972 Democratic presidential primaries in Wisconsin and Michigan, both of which were open to voters other than members of the Democratic party. In both states, the candidate preferences of non-Democrats differed from those of Democrats: in Wisconsin, Hubert Humphrey would have narrowly defeated George McGovern if the contest had not been open to Republicans and independents. With the votes of these intruders, however, McGovern won convincingly: "the victory

reinvigorated his slumping campaign." Although the order of finish of the candidates would not have been altered in the Michigan open primary, Humphrey's share of the delegates chosen would have increased if the participants had been limited to Democrats. Political scientist James Lengle concludes that, in an open primary, "the effect of partisan-related candidate preferences is to distort both the voice of party members and the strength of the party's presidential contenders." J. Lengle, *Representation and Presidential Primaries: The Democratic Party in the Post-Reform Era* 100, *see generally* 98–103 (1981). *See also* D. Adamany, "Cross-Over Voting and the Democratic Party's Reform Rules," 70 Am. Pol. Sci. Rev. 536 (1976), cited extensively by this Court in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).[2]

One may praise or condemn the results in these particular primary elections. The point is that those persons who associated with the party for the purpose of expressing their political views had their preferences as to candidates — and the policies consequently espoused by their party — altered or distorted because of interlopers in their association. Those intruders may not have bent on "raiding"; they may have voted in that primary only because of the absence of an exciting race in the other party's primary. (Lengle did not believe that there was an organized Republican raid in the open Democratic primaries in either Wisconsin or Michigan in 1972. Lengle, *supra* at 102.) But their participation in the primary election on the same terms as *bona fide* members of the party nevertheless distorted the very expression of views for which the members entered into that association. As David E. Price concludes, "Open primaries dilute the impact of the parties' core constituencies." D. Price, *Bringing Back the Parties* 132 (1984).

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[2] Adamany's data, which indicated greater support for McGovern than he actually received, were, as the author states, somewhat contaminated by a halo effect, inasmuch as voters were not sampled until after the general election. Adamany, *supra* at 537.

The Committee on Political Parties of the American Political Science Association (APSA) anticipated these empirical findings when it made its recommendations in 1950. "The meaning of [party] membership itself suggests that those who identify themselves with the group have something in common which they do not share with those outside it." Committee on Political Parties, *Toward a More Responsible Two-Party System* 66 (American Political Science Association, 1950). The APSA Committee accordingly recommended the adoption of the closed primary, because "it tends to support the concept of the party as an association of like-minded people. On the other hand, *the open primary tends to destroy the concept of membership as the basis of party organization.*" *Id.* at 71 (emphasis in original).

Political scientists have observed that closed primary elections produce other benefits for the party system as well. The lists of party enrollees generated by registration prior to a closed primary are "invaluable tools for the parties as they undertake voter registration and get-out-the-vote drives and other efforts at communication and organization." Price, *supra* at 132. Because control of the nomination is in the hands of the same people who choose the leaders of the party organization, "candidates and officeholders have stronger incentives to work with party organizations and to support party positions." *Id.* Recruitment of candidates by party leaders may be facilitated because there is a greater assurance that the carefully chosen recruit will win the primary. Morehouse, *supra* at 177.

In addition, as V.O. Key observes, "the open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party." V.O. Key, *Politics, Parties, & Pressure Groups* 392 (5th ed., 1964). Moreover, the open

primary may reduce the quality of debate about state policy issues. The need for candidates to make themselves attractive to the entire electorate at the primary stage may force them to de-emphasize the formulation of differences in policy between the parties and appeal to voters in what has become "the first round of the general election" on the basis of personality, image and "freewheeling candidate and issue appeals based outside the parties." Price, *supra* at 132.

Given the array of benefits of closed primaries and disadvantages of open primaries for the party system in general, together with the fact that in a closed primary the views of the members of a political party are not distorted by the participation of non-members, political scientists have recommended that "party leaders and legislators in states with open-primary and same-day systems would do well to examine their debilitating effects on parties and to consider corrective action." Price, *supra* at 132.[3] As Sarah McCally Morehouse concludes her leading text on state politics, "It is certainly not too much to ask that those who help select the party nominee in a primary should be party members with more than a passing attachment to the party. . . . State laws should restrict voting in primaries to those who have registered with a party. . . ." S. Morehouse, *supra* at 488.

States need not follow the advice of the professors, of course, but should a state legislature conclude that it desires to adopt the public policy of strengthening the party system within its borders, there are certainly valid reasons to support the legislature's conclusion. The state would surely have at least a legitimate interest in fostering the party system, in preventing the dilution and/or alteration of the views of the members of political parties, and in protecting the associations formed to espouse the adoption of certain principles of public policy from intrusion by those preferring different policies and different candidates.

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[3] "Same-day" registration systems require no party affiliation in advance. Voters declare their preference for parties at the polls.

B. Judicial Analysis.

Courts have recognized that states have this "legitimate interest in protecting party members' associational rights, by legislating to protect the party 'from intrusion by those with adverse political principles,' " as a three-judge District Court wrote in 1976 concerning the statute here at issue. *Nader v. Schaffer,* 417 F. Supp. 837, 845 (D. Conn. 1976), *aff'd mem.,* 426 U.S. 989 (1976), quoting *Ray v. Blair,* 343 U.S. 214, 221-22 (1952). The *Nader* court continued:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historical electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies, and preventing fraudulent and deceptive conduct which mars the nominating process." *Nader v. Schaffer, supra* at 845.

This Court has reached a similar conclusion concerning the legitimacy of establishing a cutoff point for registration or party enrollment in New York: the purpose of New York's statute was to "inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller,* 410 U.S. 752, 760 (1973). This Court then said, "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." *Rosario, supra* at 761.

Certainly, this Court has recognized that protection of party members from intrusion by others is in general a necessary concomitant of the freedom of association. In *Democratic Party*, this Court stated — there in reference to a political party's own rules which excluded non-party members from presidential primaries — "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to *limit* the association to those people only." 450 U.S. 107, 122 (1981) (internal citation omitted and emphasis added). This Court then cited with approval Professor Tribe's comment that "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, *American Constitutional Law* 791 (1978), quoted in *Democratic Party*, *supra* at 122 n.22. The Court added that it had recognized on several occasions "that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions — thus impairing the party's essential functions." *Id.* at 122.

II. THE CIRCUIT COURT HAS MISCONSTRUED PRIOR RULINGS OF THIS COURT.

Appellees' claim in this case is that the State of Connecticut, in pursuing the goal of protecting the members of a political party from intrusion by others, has substantially infringed on the right of association of Connecticut Republican Party members, who have decided to permit voters unaffiliated with either party to vote in some of its primary elections. The Second Circuit Court of Appeals has subscribed to the view that the statute at issue, Conn. Gen. Stat. § 9-431, "substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association," and has stated further that such a statute "may be upheld only if it is necessary to advance compelling state interests and only if it is tailored to advance those interests in the least restrictive manner." J.S. App. at 112.

Amici respectfully contend, however, that the lower court has fundamentally misconstrued previous rulings of this Court in reaching its conclusion, while brushing aside the state interests present here.

A. The Standard Of Review Employed By The Circuit Court Was Misapplied.

Specifically, the court below has misapplied the standards clearly and undeviatingly expressed by this Court in a long line of cases dealing with the power of a state to regulate various activities of a political party. A judicial inquiry must first determine if a state law imposes "substantial burdens on the freedom to associate" or if only "minor restrictions on associational activities" are imposed. Note, "It's My Party and I'll Cry If I Want To: State Intrusions Upon the Associational Freedoms of Political Parties — *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*," 1983 Wis. L. Rev. 211, 220. If, as in *Democratic Party*, the Court finds a "substantial intrusion into the associational freedom of members of the National Party," *Democratic Party*, *supra* at 126, the Court must then consider "whether the State has compelling interests that will justify the imposition of its will" on the party. *Id.* at 124.[4]

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[4] In *Kusper v. Pontikes*, 414 U.S. 51 (1973), this Court first considered whether the statute there at issue "substantially restrict[ed]" the voter's right to change his affiliation, *id.* at 57, or was a "significant encroachment upon associational freedom." *Id.* at 58. It then proceeded to determine the extent of Illinois' interest, stating that the interference "could not be justified upon a mere showing of a legitimate state interest." *Id.* at 58. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), this Court also apparently first considered the petitioners' contention that the injunction there at issue was a " 'significant interference' with protected rights of political association." *Id.* at 488. Only then did it proceed to determine if "Illinois had a compelling interest." *Id.* at 489. Also apposite is *Storer v. Brown*, 415 U.S. 724 (1974), dealing with a California dis-affiliation requirement for candidates: citing *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court stated the requirement that there first must be a finding that the statute "severely burdened the right to associate for political purposes;" if so, then the discriminations "had to be justified by compelling state interests." *Storer*, *supra* at 729.

If, on the other hand, as in *Marchioro v. Chaney*, 442 U.S. 191 (1979), this Court finds that "there can be no complaint that the party's right to govern itself has been substantially burdened by statute," *id.* at 199, this Court then must only determine if the state's interest is "legitimate." *Id.* at 196. The *Marchioro* court specifically distinguished *Cousins:* "In *Cousins*, unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite." *Id.* at 199 n.15. Moreover, it summarized with approval the ruling of the Washington Supreme Court: "The state court reasoned that although ' "substantial burdens" ' on the right to associate for political purposes are invalid unless ' "essential to serve a compelling state interest," ' these appellants failed to establish that this statute had imposed any such burden on their attempts to achieve the objectives of the Democratic Party. Since this initial burden had not been met, the court upheld the constitutionality of the challenged statute." *Id.* at 195.

The standards in these cases do not alter "the analytic paradigm employed in determining the constitutionality of state impingements upon party autonomy" which one leading commentator suggested in 1978: "mild restrictions on political parties must relate rationally to some legitimate state interest; if a state rule substantially erodes the freedom of association of party members, however, the rule will be upheld only if it is shown necessary to serve a compelling state interest." L. Tribe, *American Constitutional Law* 786 (1978).

B. The State Has Not Substantially Burdened The Appellees' Associational Rights.

Employing the correct standard in the instant case, it may be seen that, as in *Marchioro v. Chaney*, the "initial burden," *supra* at 195, of demonstrating that the state has imposed a substantial restriction on the right of association has not been met.

1. The Party's associational right to attract new members is not substantially burdened.

Connecticut has not substantially interfered with the right of members of the Republican Party to associate with whomever they desire to attract. Unlike the requirement which locked a voter into a pre-existing party affiliation, declared unconstitutional in *Kusper v. Pontikes*, 414 U.S. 51 (1973), and even unlike the delayed-enrollment scheme upheld in *Rosario v. Rockefeller, supra*, Connecticut specifically permits Connecticut Republicans to continue to attract party members by permitting them to affiliate with the party until noon of the business day before a primary election. Conn. Gen. Stat., § 9-56. There is no 23-month waiting period before affiliation takes effect, which essentially "absolutely preclude[d]" the appellee in *Kusper* from voting in her chosen party's primary, and thus absolutely barred members of that party from attracting her support during that period. *Kusper, supra* at 58. The statute here "does not freeze the status quo," *Anderson v. Celebrezze*, 460 U.S. 780, 806 at 817 (1983) (Rehnquist, with White, Powell, and O'Connor, dissenting) which all Justices of this Court agreed was impermissible in the context of filing deadlines on Presidential candidates imposed by Ohio. *Id.* at 794.[5]

2. The state is not controlling the internal affairs of the Party.

Connecticut has not substantially interfered with the internal organization or affairs of the group which has associated to pursue political ends.

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[5] Professor Tribe concludes, after an analysis of *Kusper, supra*, and *Rosario, supra*, that "contemporaneous affiliation," a requirement essentially similar to Connecticut's one-day waiting period, is justifiable: "Absent a willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being abridged; without a commonality of interest, there is little association to abridge." Tribe, *supra* at 793.

a. The state is not forcing the Party to accept members who may distort its views.

Unlike the Illinois state law found to be superseded by the decision of the Democratic national convention in *Cousins v. Wigoda, supra*, unlike the Wisconsin rule which bound the Wisconsin delegates to the national party convention to honor the results of the Wisconsin open primary in voting for presidential candidates, declared void in *Democratic Party, supra*, and even unlike certain other government actions referred to in *Roberts v. Jaycees,* U.S. , 104 S.Ct. 3244 (1984), as infringing on the right to associate for expressive purposes, the Connecticut statute does not intrude "into the internal structure or affairs of an association" in that it does *not* "force[ ] the group to accept members it does not desire." It does *not* "impair the ability of the original members to express only those views that brought them together." *Roberts v. Jaycees, supra* at 3252. Like the Minnesota Human Rights Act upheld by the Court in *Roberts*, the statute "requires no change in . . . creed . . . and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of existing members." *Roberts, supra* at 3254. On the contrary, the Connecticut statute here at issue, Conn. Gen. Stat. § 9-431, seeks to *protect* the associational rights of members of the Republican Party from interlopers.

b. The state is not hindering the Party's internal, non-electoral decision-making process.

Unlike the actions of Illinois in *Cousins v. Wigoda, supra*, which sought to override the internal rules of the Democratic Party for the selection of delegates to be seated at its national convention, and unlike the Wisconsin statute in *Democratic Party v. Wisconsin, supra*, which bound by state law votes of delegates to the national convention, the Connecticut

statute here in question does not deal with the *internal* processes of the Republican Party, but with a primary election that determines which candidate will be granted access to the general election ballot. *Marchioro v. Chaney, supra,* clearly distinguishes " 'purely internal party decisions,' " *id.* at 197, from the "critical role played by political parties in the process of selecting and electing candidates for state and national office." *Id.* at 196. Statutes which regulate "the orderly participation of the political party in the electoral process," *id.* at 197, are supportable. "The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Id.* at 196, quoting *Storer v. Brown,* 415 U.S. 724, 730.[6]

c. The Party is not a purely private organization.

Unlike the various state actions which sought disclosure of the membership lists of private organizations, such as those struck down in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958) and *Bates v. City of Little Rock,* 361 U.S. 516 (1960), and unlike other statutes considered in cases cited in *Roberts v. Jaycees, supra* at 3250-52, the Connecticut statute here does not regulate a purely private organization, the members of which have an "intrinsic" right to "enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 3249. The Republican Party is not distinguished by its "relative

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[6] As the Fourth Circuit Court of Appeals observed in another context in *Rice v. Elmore,* "the fundamental error in [South Carolina's] position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery." 165 F. 2d. 387, 389 (4th Cir. 1947) (footnote omitted).

smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 3250. Indeed, the names of those affiliated with the Republican Party or any other political party are open to anyone for public inspection, and are disseminated widely so that the affiliated voters may be targeted to receive information. Conn. Gen. Stat. § 9-55. Moreover, although Connecticut statutes provide that party officials may remove a person from the list of party members for lack of good-faith party affiliation, Conn. Gen. Stat. § 9-60, there has been no showing in this case that the procedure has ever been used, or that the Party "employs any criteria for judging applicants for membership." *Roberts, supra* at 3251.

3. The National Party's rules and decisions are not regulated by the state.

Unlike the injunction overturned in *Cousins, supra*, unlike the statute struck down in *Democratic Party, supra*, and unlike the early filing deadline for Presidential candidates declared void in *Celebrezze, supra*, the Connecticut statute does not have extra-territorial application. It does *not* "seriously undercut or indeed destroy the effectiveness of the National Party Convention" which "serves the pervasive national interest in the selection of candidates for national office," which "national interest is greater than any interest of an individual State." *Cousins v. Wigoda, supra* at 490. Here no state restriction is imposed on a "nationwide electoral process," which the "State has a less important interest in regulating . . . than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze, supra* at 795.

C. Connecticut Has A Legitimate Interest In Preventing Distortion Of The Electoral Process.

Accordingly, although states which adopted statutes or regulations possessing any of the foregoing attributes might be required to demonstrate a compelling state interest, Connecticut need only show that it had a legitimate and valid state interest in adopting the statute here in question. On the authority of prior cases, it can accomplish — and indeed has accomplished — that task.

As this Court summarized in *Anderson v. Celebrezze, supra*, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *id.* at 788, such as those "that protect the integrity and reliability of the electoral process itself." *Id.* at 788 n.9. Specifically, a state "has the right to prevent distortion of the electoral process by the device of 'party raiding.' " *Id. See also Kusper, supra* at 61, in which the Court refers to the "legitimate interest of Illinois in preventing 'raiding,' " even though the particular method chosen did not pass constitutional muster.

This Court specifically described "raiding" in *Rosario, supra*, as the practice "whereby voters in sympathy with one party" — not just members — "designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Id.* at 760.

Distortion of the electoral process can occur, as observed by amici in this brief, *supra* at pages 4-6, when voters unaffiliated with either party decide to cast ballots in a party primary. Whether impelled by a deliberate desire to seek the nomination of the candidate least likely to win the general election, or simply attracted by an exciting campaign, independent or unaffiliated voters can dilute the preferences of party members, an outcome which the state has a legitimate interest in preventing.

CONCLUSION

This Court has never expressly ruled on the question of whether states may regulate the conduct of primary elections by state parties which determine the party's nominee in a state election. The majority in *Cousins* emphasized that "the only question that we decide today," *id.* at 483 n.4, is "whether the Appellate Court was correct in according primacy to state law over the National Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention," *id.* at 483, a view with which Justice Powell agreed: "state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance." *Id.* at 496, 497 n.* (Powell, J., concurring and dissenting). The Circuit Court in the instant case, however, has not recognized these "different considerations," and has misconstrued an entire line of decisions of this Court.

Therefore, for the reasons stated above, this Court should note probable jurisdiction.

Respectfully submitted,

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NO. 85-766
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE HONORABLE CHRISTOPHER J. DODD, UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT, AND THE HONORABLE BRUCE A. MORRISON, UNITED STATES CONGRESSMAN FROM THE THIRD CONGRESSIONAL DISRICT, STATE OF CONNECTICUT

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Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967).

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Oregon v. Mitchell, 400 U.S. 112 (1970).

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Smiley v. Holm, 285 U.S. 355 (1931).

Storer v. Brown, 415 U.S. 724 (1974).

United States v. Classic, 313 U.S. 299 (1941).

United States v. Gradwell, 243 U.S. 476 (1916).

Williams v. Rhodes, 393 U.S. 23 (1968).

STATEMENT OF INTEREST OF AMICI

Amici are elected Federal legislators who are members of the Democratic Party. The Honorable Christopher J. Dodd is a United States Senator from the State of Connecticut. The Honorable Bruce A. Morrison is a Member of Congress from the Third Congressional District, State of Connecticut.

Amici join this case because no other Federal legislators who are members of the Democratic Party are represented in this action. Also, as elected officials from the State of Connecticut, amici have a substantial interest in vindicating the constitutional duty of the State in regulating elections.

Appellant and appellees have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case does not turn on the constitutionality of open or closed primaries, or on the legitimacy of maintaining the two party system or preventing party "raiding". Rather, it concerns the boundaries which the First Amendment places on a state exercising its Article I duty to regulate elections. In deciding this case this Court must balance the interest of the State in fulfilling its constitutionally assigned duty against the right of a party to pursue a potential, temporary association with individuals to whom it does not extend the full privileges of membership.

In exercising its duty under Article I of the Constitution, a State may, in a non-discriminatory fashion, regulate the relationship between a party and non-members. While this Court has held that a

significant intrusion into the internal workings of a political organization requires a compelling state interest, the statute at issue in this case does not in any way regulate the relationship of the members of the party inter se.

The courts below failed to distinguish between an intrusion into the internal workings of a party and an exercise of state responsibility under Article I of the Constitution which affects the relationship between a political party and individuals who have chosen not to become members of the party. By mistakenly analyzing that case as involving an intrusion into the internal affairs of a political organization, the Court of Appeals incorrectly required Connecticut to demonstrate a compelling interest for its challenged statute when its rational and legitimate interests are

sufficient to sustain the statute's validity.

ARGUMENT

I. CONNECTICUT HAS A CONSTITUTIONAL DUTY TO REGULATE ELECTIONS.

A state has a substantial interest in carrying out its constitutionally assigned duty to regulate elections. While this duty must be balanced against the limitations imposed by other constitutional provisions, it derives directly from the text of the Constitution and must be accorded great weight.

Article I of the Constitution explicitly creates this duty to regulate elections.

> The policy of . . . entrusting the conduct of elections to state laws, administered by state officers, which has prevailed from the foundation of the Government to our day, . . . was proposed by the makers of the Constitution and was entered upon advisedly by the people who adopted it . . . .

United States v. Gradwell, 243 U.S. 476, 484 (1916).

Article I, Sec. 4 assigns states the responsibility to regulate each aspect of the electoral process.[1]

> The subject matter [of Art. I, Sec. 4] is the "times, places, and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience show are necessary in order to enforce the fundamental right involved.

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[1] Article I, Sec. 4 provides:

> The Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of choosing Senators.

Smiley v. Holm, 285 U.S. 355, 366 (1931).

"That the states may specify the qualifications for voters is implicit in Article I, Sec. 2 . . . ," Baker v. Carr, 369 U.S. 186, 243 (1961), so that in determining standards required of voters, a state has "wide scope for exercise of its jurisdiction," Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1958).[2]

This Court has held that when a state has chosen to include in its electoral mechanisms primaries as a means of access to the general electoral ballot, the state's interest applies equally to the

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[2] Article I, of Sec. 2, Clause 1, provides,

> The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the Electors, in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

primary and to the general election. United States v. Classic, 313 U.S. 299 (1941). See, also, Smith v. Allwright, 321 U.S. 649 (1944), and Buckley v. Valeo, 424 U.S. 1 (1975).

Although the Constitution grants the states "broad powers," Roudebush v. Hartke, 405 U.S. 15, 25 (1971), to regulate both primary and general elections, these powers must be exercised within the bounds of the Constitution itself, for while it is

> . . . the established rule of law that the franchise is essentially a matter of state concern, Minor v. Happersett, 21 Wall. 162; Lassiter v. Northampton Election Board, 360 U.S. 45, [it is] subject to the overriding requirements of various federal constitutional provisions dealing with franchise, e.g., the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments, and, as more recently decided, to the general principles of the Fourteenth Amendment. Reynolds v. Simms, 377 U. S. 533; Carrington v. Rash, 380 U.S. 89.

Katzenback v. Morgan, 384 U.S. 641 (1965). Like other constitutional provisions, the First Amendment places a limitation on the state's duty to regulate elections.

II. THE ASSOCIATION SOUGHT BY THE REPUBLICAN PARTY IS A HIGHLY ATTENUATED RELATIONSHIP WHICH THE CONSTITUTION PERMITS TO BE AFFECTED BY THE STATE PURSUANT TO ITS CONSTITUTIONAL DUTY TO REGULATE ELECTIONS.

The validity of the Conn. Gen. Stat. Sec. 9-431 requirement of party registration for primary voters turns on the standard of review applied. There can be no doubt that the duties assigned Connecticut by Art. I, Sec. 4, represent a sufficient state interest to justify the minimal enrollment requirement involved, if measured against a "legitimate state interest test." Only because the courts below held the Connecticut requirement to the extraordinarily stringent "compelling interest" standard was the statute found wanting.

This Court's decisions construing associational rights under the First Amendment do not support the standard of review chosen by the courts below. They

have treated the Connecticut statute as intruding into the internal affairs of the Republican Party when it in fact does no more than regulate the Party's interaction with non-members for the purpose of primary voting.

The distinction in the cases decided by this Court is quite clear, though not necessarily explicit. On the one hand, this Court has held that intrusions into the internal workings of a party require a compelling interest.

> [T]he government may try to interfere with the internal organization or affairs of the group, e.g., Cousins v. Wigoda, 419 U.S. 477, 487-488. . . . Infringements on that right may be justified by regulations adopted to serve compelling state interests . . . .

Roberts v. United States Jaycees, 82 L. Ed. 2d 462, 474-475 (1984). And, the Court has repeatedly used a compelling interest test when the State has

substantially intruded into the workings of a political party by attempting to regulate how the party will conduct its internal affairs.

> The issue is whether the State may compel the National party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in Cousins v. Wigoda, 419 U.S. 477. . . . [A] State . . . may not constitutionally substitute its own judgement for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 121, 124-125 (1981).

In discussing a group's right of association, however, this Court has always been extremely careful, in its language, to limit its holding to the group and its members. This Court has explained that "compelled disclosure of petitioners Alabama membership is likely

to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs . . . ," N.A.A.C.P. v. Alabama, 357 U.S. 449, 462-463 (1958) (emphasis added); "compulsory disclosure of the membership lists . . . would work a significant interference with the freedom of association of their members," Bates v. Little Rock, 361 U.S. 516, 523 (1960) (emphasis added). In other contexts, it has stated "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys . . . to assist its members . . . " Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217, 221-222 (1967) (emphasis added); and that "Minnesota's compelling interest . . . justifies the impact that application of the statute . . . may have on the male

members' associational freedoms," Roberts v. United States Jaycees, 82 L. Ed. 2d 462, 475, (emphasis added).

Membership has also been central in the ballot access and convention delegate cases. "The state . . . has made it virtually impossible for a new political party, even though it has hundreds of thousands of members . . . to be placed on the state ballot . . . ." Williams v. Rhodes, 393 U.S. 23, 24 (1968) (emphasis added). "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association," Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (emphasis added); "the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party," Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 126

(1981) (emphasis added).

In each of the above-cited cases, the state was attempting, in some way, to regulate the relationship between the group and individuals who had declared themselves members of the group. The state was attempting to intrude into the internal workings of the group.

On the other hand, a lesser standard of review has been applied regarding the association of a political party with potential members. This Court's decisions, Kusper v. Pontikes, 414 U.S. 51 (1973), Rosario v. Rockefeller, 410 U.S. 752 (1972), and Nader v. Schaffer, 429 U.S. 989 (1976) aff'g without opinion 417 F.Supp. 837 (D.Conn.), should control the outcome in this case. In these cases, this Court has clearly and unambiguously set out the First Amendment limits on a state exercising its Article I responsibility of regulating elections.

The Court of Appeals below misapplied Kusper, Rosario, and Nader in three ways. First, it ignored the standard of review in these cases most closely analogous to the case presented. It failed to recognize the crucial distinction between the inapposite intrusion cases and these "right-on-point" enrollment or membership requirement cases.

In Rosario v. Rockefeller, 410 U.S. 752 (1972), the state imposition of a time limit for enrollment in a party was considered. While this time limit burdened the associational rights of the individuals seeking to vote in that case, the statute was upheld because it served a "legitimate purpose and [was] in no sense invidious or arbitrary." 410 U.S. at 762. This standard was applied despite a dissenting argument in favor of stricter scrutiny. 410 U.S. at 768 (Powell,J.,

dissenting). But even the dissent acknowledged the validity of a shorter time limit of 30 to 60 days, id., at 771, and absolutely no doubt exists that the requirement of enrollment as a condition of primary voting was deemed valid.

The Court in Rosario took care to point out that despite the eight to eleven month delay, voters were not precluded from voting since, had they chosen to enroll in a party, they could have participated in a primary.

> We do not uphold the statute on the ground that it is merely a prohibition on voting in one particular primary, rather than a permanent ban on voting. That is neither our point nor the effect of the law. The point is that the statute did not prohibit the petitioners from voting in any election, including the 1972 primary, had they chosen to meet the deadline established by the law.

The Court reasoned that, by virtue of this element of choice, the time limitation imposed by the New York scheme was

constitutionally acceptable. "New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment. . . . " Rosario v. Rockefeller, 410 U.S. 752, 762.

In Kusper v. Pontikes, 414 U.S. 51 (1973), this Court explored the limits on the Rosario decision and held that

> By preventing the appellee from participating at all in Democratic Primary Elections during the statutory period, the Illinois statute deprived her of any voice in choosing the parties candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

414 U.S. 51, 58. At issue in Kusper was a state rule which prohibited a person from voting in the primary election of a political party if he had voted in the primary of any other party within the

preceding 23 months. The Court in Kusper was careful to explain how the rule at issue in that case differed from the Rosario rule. "[W]hile the Court held in Rosario that the New York delayed enrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-month rule does just that." Kusper v. Pontikes, 414 U.S. 51, 61.

The present case falls well within the bounds set out by the Kusper-Rosario rule. The State statute in this case does not prevent voters from associating with the Republican Party. It merely sets out a legitimate time limitation on party enrollment -- a time limitation which was substantially less than the burden found acceptable in Rosario.[3]

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[3] The contrast between the participating

rights of party members and the role provided to unaffiliated voters by the Republican Party rule is very substantial. Party members obtain by enrollment, Conn. Gen. Stat. Sec. 9-57, a wide variety of opportunities to associate with the party, including participation in party conventions, Sec. 9-383 - 9-386; participation on town committees, Sec. 9-392 - 9-393; participation in state legislature conventions, Sec. 9-394 - 9-394a; voting at municipal caucuses, Sec. 9-396a - 9-397; voting in primaries for town committee members, convention delegates, and all state and municipal offices, beyond just the statewide ticket and Congress, Sec. 9-415 - 9-431; and participation as a candidate for municipal, state and federal offices, see generally, Sec. 9-381 - 9-450. The opportunity to participate in state ticket and federal legislative primaries is a much more attenuated opportunity to associate, especially because such primaries cannot even occur unless convention delegates (from whose selection unaffiliates are barred) give sufficient support (at least twenty percent of a roll call vote) at a convention or, for municipal offices, a petition (which unaffiliates cannot sign) of a sufficient number of party members is filed. This is hardly the crusade of openness by which the Republican Party rule was characterized below.

Second, the Court of Appeals mistakenly made much of the fact that Nader and Rosario involved challenges by potential voters rather than by political parties. But this distinction is of no constitutional significance. Association is a bilateral interaction. While one party or the other can initiate an association, it cannot exist without consent of both parties. And an association does not exist until that consent has been given. To say, as the Court of Appeals does, that the Republican Party has a greater interest in seeking an association with an unaffiliated voter than that voter has in association with the Republican Party has no basis in logic or law. Once this is recognized, it becomes clear that Rosario and Nader govern the result in this case.

Third, the Court of Appeals improperly analogized the limitation which

Sec. 9-431 places on the Republican Party to the locking in of the petitioner in Kusper. See, 770 F. 265, 281 n. 24. But on examination, this analogy is found wanting. It is not Sec. 9-431 which limits the Republican Party's ability to associate with unaffiliated voters. With or without the challenged statute, the Party must persuade these voters to associate with it. Until then, any associational interest is inchoate.

Contract rules of offer and acceptance provide a helpful way of thinking about the present case. The Republican Party on its own cannot associate with unaffiliated voters. The most the Party can do is to make a unilateral offer to unaffiliated voters to associate with the Party. Kusper and Rosario establish the limits of state intrusion into that offer and acceptance.

The difference between the two cases in this regard is that in Kusper, the state statute absolutely prevented association and voting no matter what the individual did between elections, while in Rosario the individual could have associated with the party and voted had he chosen to register. The Court in Rosario upheld the state statute requiring the individual to take action, even though that action needed to be taken eight months before the election. The crucial distinction is that in Rosario, the unaffiliated voter was not prevented from voting, even though the state had placed a burden on him to act.

As noted above, the fact that the party is challenging this burden, rather than the individual is not significant. And the fact that a potential primary voter must join the Republican Party the day before a primary election rather than show up to vote one day later hardly

leaves the party powerless to attract these voters to its cause. It must merely act one day earlier and establish the association by extending the rights of membership. It is the failure to accord membership which is the true conflict between the Republican Party rule and Sec. 9-431. But in the absence of a membership relationship, the Party's associational interests are attenuated and cannot overcome the state's ultimate choice to require enrollment under its Article I responsibility to regulate elections.

This Court removed any doubt about the meaning of Kusper and Rosario when it summarily affirmed Nader v. Schaffer, 429 U.S. 989 (1976), aff'd without opinion, 417 F.Supp. 837 (D. Conn.). In Nader, the District Court used a legitimate state interest standard to uphold the very same

law at issue in this case. Relying on Rosario, the District Court reasoned that the enrollment requirement of the Connecticut statute was a minimal burden on petitioner's First Amendment rights. 417 F.Supp. 837, 848. Since the same statute is at issue in the present case, the burden on petitioner's First Amendment rights must be "minimal". As a consequence, the minimal burden placed on petitioner's First Amendment rights is outweighed by the state's interest in fulfilling its constitutional mandate to regulate elections.

III. ARTICLE I, SEC. 2 FORBIDS A STATE OR PARTY FROM APPLYING DIFFERENT ELECTORAL ELIGIBILITY STANDARDS FOR STATE AND FEDERAL LEGISLATORS.

Article I, Sec. 2 of the Constitution provides that:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

This Court has stated in unambiguous language how Art. I, Sec. 2 is to be read:

> The states in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Ex Parte Yarbrough, 110 U.S. 651, 663 (1883). More recently the Court has stated,

> Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators.

Katzenbach v. Morgan, 384 U.S. 641, 647 (1965).

In Oregon v. Mitchell, 400 U.S. 112, 125 (1970), Justice Black, delivering the judgment of the Court and expressing his own view of the case, stated that

> Art. I, Sec. 2 is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Article I, Sec. 4.

In United States v. Classic, 313 U.S.

299, 318 (1941), this Court held that Secs. 2 and 4 of Article I apply to primaries, as well as to general elections.

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes, or never determines the ultimate choice of the representative. [Emphasis added].

Again in Buckley v. Valeo, 424 U.S. 1, 14 n. 16 (1975), the Court restated Classic's holding.

> Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Article I, Sec. 4, Newberry v. United States, 256 U.S. 232 (1921), it

later held that primary elections were within the Constitution's grant of authority to Congress. United States v. Classic, 313 U.S. 299 (1941). Id. at 14, Note 16.

Since the primaries fall under the Article I definition of elections,[4] the Republican Party rule, which permits different electors to vote in congressional elections than those who

---

[4] The Court of Appeals concluded that Classic was not controlling. While claiming that the question was one of first impression, the Court divided Sec. 2 into two clauses, the first of which, it reasoned, "chosen . . . by the people", concerned a substantive right to vote, while the second clause was intended as a "procedural safeguard." The question is not one of first impression. The language of Classic is clear. Secs. 2 and 4 of Article I refer both to general elections and to primaries. To split Sec. 2 apart, as the Court of Appeals did, in order to argue that "by the people" refers to party primaries, but that the phrase "and the electors", four words away, does not, does violence both to the text of Sec. 2, as well as to the language of Classic and its progeny. Indeed, amici has been able to find nothing in the history of the Constitution, or in any case, to support this interpretation.

vote for the most numerous branch of the state legislature, violates the Constitution.

Respectfully submitted,

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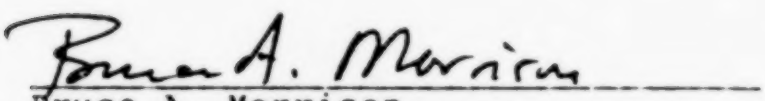

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CERTIFICATION

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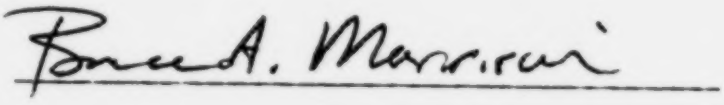

No. 85-766

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Appellant,

—against—

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Interest of Amici Curiae

The State of New York, joined by the states of Alabama, Arizona, Delaware, Florida, Illinois, Louisiana, Maine, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee and Wyoming, submits this brief *amicus curiae* in

support of appellant, urging reversal in order to protect the states' rights to conduct and control the electoral processes in their states.

The *amici curiae* have a strong interest in the management of primary elections within their respective states. They all regulate primary elections to some degree. Many of them provide money, personnel and equipment for primary elections. Results of the primaries are generally certified by the states.

Some of the *amici* have statutes similar to Conn. Gen. Stat. § 9-431, which require a voter to be enrolled in a political party in order to vote in a primary election.[1] Thirty-eight states have such statutes, and all of these statutes are directly threatened by the Second Circuit's ruling in this case.

Two of the *amici* states do not require party enrollment as a prerequisite to participation in primary elections.[2] However, the holding of the Second Circuit significantly threatens the election statutes in those states because it leaves political parties virtually free to manipulate the primary process as they see fit. The states which have open primaries provide for them by statute, and those laws would be equally threatened.

The statutory schemes of every state in the Union which govern primary elections are brought into question by the broad rationale of the Second Circuit's decision. As both the Second Circuit and the District Court in this case recognized, the issues in this litigation have profound implications for electoral regulation nationwide. Thus, New York and the other *amici* states have a keen interest in protecting their rights to regulate the primary elections within their respective electoral systems.

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[1] *See, e.g.*, Ariz. R.S. § 16-467; 21-A Me. R.S.A. § 143; N.Y. El. L. § 8-302.4; N.C. Gen. Stat. § 163-59; Tit. 26 Okla. Stat. § 1-104; Wyo. El. Codes § 22-5-212.

[2] *See, e.g.*, La. R.S. § 18:401 *et.seq.*; N.D. Cent. Code § 16.1-11-22.

Summary of Argument

Article I, § 2 and the Seventeenth Amendment vest the power to regulate the electoral process in each individual state. Because the primary election has become an integral part of this electoral process, the constitutional provisions apply to primaries, as has been long recognized by this Court.

Primary elections are subject to the qualifications requirements of article I, § 2 and the Seventeenth Amendment to the United States Constitution. The distinction made by the court below – that regulating the substantive right to vote is separate and distinct from regulating the qualifications as to who may exercise that right – is arbitrary. The distinction is not supported by a logical reading of the Constitution or the constitutional history relied on by the court. Furthermore, the holding of this Court in *United States v Classic*, 313 U.S. 299 (1941), which established that primary elections were subject to the Constitution, did not make any artificial distinction such as that set forth by the Second Circuit.

A political party's freedom of association is not infringed by a state's regulation of qualifications for the primary electorate. State regulations which have a rational basis and do not violate any constitutional rights of the political parties are an appropriate exercise of the state's authority.

ARGUMENT

STATES HAVE AUTHORITY TO REGULATE THEIR PRIMARY ELECTIONS UNDER THE QUALIFICATIONS REQUIREMENTS OF THE CONSTITUTION.

I. *Primary elections are subject to the qualifications requirements of article I, § 2 and the Seventeenth Amendment to the United States Constitution.*

Section 2 of article I of the Constitution provides for the election of Members of the House of Representatives. Similarly, the Seventeenth Amendment provides for the election of United States Senators.[3] Each of these provisions mandates that the electorate for these positions "shall have the qualifications requisite for electors of the most numerous branch of the State legislature[s]." The Second Circuit was of the view that these qualifications requirements do not apply to primary elections. This position is based on an arbitrary reading of article I, section 2 and the Seventeenth Amendment, a reading which ignores years of precedent which holds that primaries are subject to constitutional regulation. Primaries form an integral part of the electoral process. Thus, contrary to the conclusion reached in the decision below,

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[3] The relevant part of section 2 reads as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The relevant part of the Seventeenth Amendment reads as follows:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifiations requisite for electors of the most numerous branch of the State legislatures.

the states' constitutional authority to regulate the qualifications of the general electorate includes the power to regulate the primary electorate.

Since the landmark cases of *United States v Classic*, 313 U.S. 299 (1941), and *Smith v Allwright*, 321 U.S. 649 (1944), the right of citizens to choose Representatives and Senators has included the right to participate in the primary elections for those positions.[4] *Classic* directly raised the issue of whether the right to vote in a primary election was secured by the Constitution.[5] This Court clearly held that primary elections were protected by article I, section 2:

> Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2.

Classic, 313 U.S. at 318.

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[4] It has since become widely recognized and accepted that primary elections that play a significant role in the choosing of candidates must meet these constitutional standards. *See, Nader v Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976); *Buckley v Valeo*, 424 U.S. 1, 13 (1976); *Anderson v United States*, 417 U.S. 211, 226 (1974); *Rosario v Rockefeller*, 410 U.S. 752, 768 (Powell, J., dissenting) (1973); *Oregon v Mitchell*, 400 U.S. 112, 120 (1970); *Reynolds v Sims*, 377 U.S. 533, 615 (Harlan, J., dissenting) (1964); *Stassen Committee v Jordan*, 377 U.S. 927 (Douglas, J., dissenting) (1964); *Gray v Sanders*, 372 U.S. 368, 380 (1963); *Terry v Adams*, 345 U.S. 461, 466 (1953); *Ray v Blair*, 343 U.S. 214, 226 (1952).

[5] Section 19 of the Louisiana Criminal Code had made it a crime to "injure" or "oppress" any citizen exercising his or her constitutional rights. The defendants in *Classic* had refused to count a black voter's ballot in a primary election for United States Representative and were convicted of violating section 19. The issue was whether their actions had violated any constitutional rights of the black voters.

Four years later, in *Smith v Allwright*, 321 U.S. 649, this Court followed the *Classic* holding and held that the Seventeenth Amendment also applies to the primary elections for United States Senators.

The Second Circuit's application of *Classic* to the immediate case distorts that case's holding and the purposes of article I, section 2 and the Seventeenth Amendment. In his opinion Judge Kaufman drew a distinction between the first and second clauses of section 2 of article I. *Republican Party v Tashjian*, 770 F.2d 265, 272-275 (2d Cir. 1985). He found that the first clause - "The House of Representatives shall be composed of Members chosen every second year by the People" - created the substantive right to participate in primary elections. He described the second clause - "and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" - as separate and distinct from the first clause.

Judge Kaufman concluded, based on his reading of section 2, that the holding in *Classic* extended only to the substantive right to vote. Because the qualifications clause was separate and distinct from that right, he found that it did not extend to primary elections. *Tashjian*, 770 F.2d at 275. The court cited a plethora of historical material, including the Federalist Papers and the writings of James Madison, which indicates that the qualifications clause was the result of compromise between various factions among the framers of the Constitution. *Tashjian*, 770 F.2d at 273-274. Based on this historical analysis, Judge Kaufman created a distinction between the two clauses of section 2 and concluded that *Classic* and *Smith* did not contemplate the qualifications clause in their holdings.

We do not take issue with the accuracy of the court's discussion of the constitutional history. Its analysis, however, does not support the distinction between the two clauses that the court drew. The references to the Federalist and James Madison's journals show only that the qualifications clause was the result of

compromise between advocates of federal and state rights. They in no way support the artificial distinction that the court created between the two clauses of section 2 of article I.[6]

The first clause of section 2 creates the right of citizens to vote for Representatives; the second clause indicates who is entitled to exercise that right. To distinguish between these two, to conclude that one clause creates a substantive right, and that the other does not, is to create a distinction where none exists. Both clauses directly pertain to the exercise of this right and those entitled to utilize it.

In his opinion, Judge Kaufman states that the qualifications clause "speaks only to the mechanics of voting and was intended as a procedural safeguard to ensure the right of the people to select members of Congress without interference from the state legislatures". *Tashjian*, 770 F.2d at 274. The purpose of the qualifications clause, however, is not to establish election mechanics or procedural safeguards; these matters are governed by section 4 of article I.[7] *Oregon v Mitchell*, 400 U.S. 112, 125 (1972). Judge Kaufman's analysis mischaracterizes the qualifications clause and concludes, in essence, that section 2 is superfluous

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[6] Judge Kaufman noted that in an earlier draft the two clauses formed two different sentences. Based on this, the court concluded that the qualifications for voting are a mere "procedural safeguard," and not part of the substantive right to vote. No matter how the framers chose grammatically to deal with the qualifications clause, the qualification to vote is an integral part of the elective process. Indeed, because it determines *who* may vote, it is identical with the right to vote. *Tashjian*, 770 F.2d at 274, n.15.

[7] Section 4 reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

in that it serves no other purpose than that served by section 4. Any assumption that the framers intended section 2 to be superfluous is, of course, erroneous.[8]

The qualifications clause, because it determines who may exercise the right to vote established in the clause that preceded it, can only be read as an integral part of this right to vote. The division between the clauses relied on by the Second Circuit is arbitrary and serves no purpose.

The Second Circuit's finding that the *Classic* decision did not deal with the qualifications clause is not supported by a reading of that case. Reference to the qualifications clause is made throughout *Classic*:

> Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is *thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by* § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.
>
> * * *
>
> Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, *the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.*

---

[8] The seminal case of *Marbury v Madison* addressed this issue in the following way:

> It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. 5 U.S. (1 Cranch) 137, 174 (1803).

* * *

> Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, *the qualifications of which it prescribes*. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, *and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution* and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.

Classic, 313 U.S. at 310, 313, 314 (emphasis supplied).

The Court explicitly discussed the qualifications clause in this passage:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states [citations omitted], this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Classic, 313 U.S. at 315.

Notably, there is no discussion in *Classic* treating the "qualifications" to vote as distinct from the right to vote itself. The court below has shown no rational reason to create this distinction, and *Classic* has clearly addressed this right as a whole. To find that the right to vote in a primary enjoys constitutional protection, yet the qualifications of those entitled to exercise that right does

not, is contrary to the plain reading of the Constitution and this Court's holding in *Classic*.

In today's political arena, where the primary election has become such an integral part of the electoral process, the Second Circuit's holding that primary elections are not subject to the constitutional provisions of section 2 of article I and the Seventeenth Amendment is archaic at best. Even at the time of *Classic*, the importance and significance of primary elections were well established. The argument that because the primary system was not contemplated by the framers it should not be subject to the Constitution is not persuasive. As noted in *Classic*:

> [I]n determining whether a provision of the constitution applies to new subject matter, it is of little significance that it is one with which the framers were not familiar.

313 U.S. at 315.[9] *See also, McCulloch v. Maryland*, 17 U.S. (4 Wheat) 159, 200, 203-204 (1819); *Opp Cotton Mills, Inc. v Administrator*, 312 U.S. 126, 145-146 (1941).

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[9] The Court's analysis of this issue is particularly incisive:

> We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. * * * There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that, if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed.

Classic, 313 U.S. at 315-316, 318.

Finally, we note that particulars of any state's law regulating primaries must of course meet constitutional standards. Nonetheless, the possible constitutional infirmity of a statute does not affect the general applicability of section 2 of article I or the Seventeenth Amendment. At one point in its opinion, the Second Circuit addresses various types of state primaries, and finds them constitutionally defective. *Tashjian*, 770 F.2d at 275. These infirmities, however, are based on violations of other provisions of the Constitution, and do not affect the applicability of article I, section 2 and the Seventeenth Amendment.

II. *Article I, §2 and the Seventeenth Amendment give the States the power to regulate the constitution of the electorate.*

In *United States v Classic*, 313 U.S. 299 (1941), this Court made it clear not only that article I, sections 2 and 4 apply to primary elections, but also that the states, within the limits of the Constitution, have the authority to regulate those elections. In referring to article I, sections 2 and 4, the Court said in *Classic*:

> Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.

Classic, 313 U.S. at 310. The Court then stated that

> [p]*ursuant to the authority given by § 2 of Article I of the Constitution*, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, *the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many*

> *other states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections*, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary.

Classic, 313 U.S. at 311 (emphasis supplied). The states are thus fully within constitutionally authorized limits when they exercise their discretion to regulate the type of primary system to be used within their boundaries.

The *Classic* opinion, with reference to the specific issues raised in that case regarding the applicability of federal criminal statutes to primary elections, went on to say that

> * * * to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Classic, 313 U.S. at 320. In the absence of congressional action, the constitutional intention was that the states had the authority to control elections, both general and primary, within the strictures of other dictates of the Constitution.[10] *Classic*, 313 U.S. at 316, 319. Thus, in an opinion by Justice Douglas, citing *Classic*, *id.* at 315, this Court subsequently stated that

> * * * while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*,

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[10] Moreoever, even without Article I, section 2 and the Seventeenth Amendment, this Court has said that "one of the powers reserved to the States under the Tenth Amendment is the regulation of the State elections". *Oregon v Mitchell*, 400 U.S. at 124-125.

> 110 U.S. 651, 663-665; *Smith v Allwright*, 321 U.S. 649, 661-62) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.

Lassiter v Northampton County Board of Elections, 360 U.S. 45, 51 (1959); *see also, Smith v Allwright*, 321 U.S. at 659-660, 664-665.

Since these decisions, the Court has consistently recognized that the states have the power to impose voter qualifications and otherwise to regulate access to the franchise. *Dunn v Blumstein*, 405 U.S. 330, 336 (1972); *see also, McDonald v Board of Elections*, 394 U.S. 802, 807 (1969). Further, they have a legitimate interest in regulating the number of candidates on the ballot at a general election, thereby requiring a primary or convention nomination procedure. *See, Illinois State Board of Elections v Socialist Workers Party*, 440 U.S. 173, 184-185 (1979); *American Party of Texas v White*, 415 U.S. 764, 781 (1974); *Bullock v Carter*, 405 U.S. 134, 145 (1972). The interest of the states in ensuring that "the critical role played by political parties in the process of selecting and electing candidates for state and national office * * * is conducted in a fair and orderly fashion is unquestionably legitimate". *Marchioro v Chaney*, 442 U.S. 191, 196 (1979). In *Storer v Brown*, 415 U.S. 724, 730 (1974), it was recognized that

> as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.[11] In any event, the

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[11] *See also, Anderson v Celebrezze*, 460 U.S. 780, 789 (1983); *American Party of Texas v White*, 415 U.S. at 780-781; *Kusper v Pontikes*, 414 U.S. 51, 59-61 (1973); *Rosario v Rockefeller*, 410 U.S. 752, 760 (1973); *Jenness v Fortson*, 403 U.S. 431, 437-438 (1971); *Smith v Allwright*, 321 U.S. at 657.

> States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner or holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases * * *.

Thus, the provisions of individual states which establish the electoral qualifications for primary elections, whether those primaries are open or closed, are within the bounds of the states' constitutionally granted right to regulate and control the electoral process. Although the specific provisions of each state have to comply with other constitutional mandates, it is indubitably for each state to determine the general makeup of the electorate of a primary election, pursuant to article I, section 2 and the Seventeenth Amendment. The Second Circuit gave no more than lip service to this fundamental principle.

III. *A political party's freedom of association is not infringed by a state's regulation of the primary electorate.*

Freedom of association, as protected by the First and Fourteenth Amendments, extends to an individual voter, a political candidate, and a political party. *Anderson v Celebrezze*, 460 U.S. at 787; *Democratic Party of the United States of America v Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981); *Cousins v Wigoda*, 419 U.S. 477, 487-488 (1975); *Kusper v Pontikes*, 414 U.S. 51; *Bullock v Carter*, 405 U.S. at 134. However, this right to associate is not absolute. *Democratic Party v Wisconsin*, 450 U.S. 124; *Roberts v United States Jaycees*, 468 U.S. ____, 104 S. Ct. 3244 (1984). The states' legitimate interest in determining the most effective means to protect the overall integrity of the electoral process, effected by legislating the qualifications required for the electorate at a primary election pursuant to article I, section

2 and the Seventeenth Amendment, is only an incidental burden on a political party's right to associate, regardless of whether that state provides for a closed or open primary. *See, Nader v Schaffer*, 417 F. Supp. 837, 845 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

A state statute must impose more than a minimal infringement on First Amendment associational rights before a strict scrutiny analysis is required. *See, Buckley v Valeo*, 424 U.S. 1, 20-22 (1976); *United States Civil Service Commission v National Association of Letter Carriers*, 413 U.S. 548, 567 (1973); *Socialist Workers Party v March Fong Eu*, 591 F.2d 1252, 1261 n.5 (9th Cir. 1978), *cert. denied*, 441 U.S. 946 (1979); *Nader v Schaffer*, 417 F. Supp. at 848-849. State statutes which merely determine, in a non-discriminatory manner, the appropriate qualifications for primary election voters place only an insubstantial burden on a political party's associational rights. There need only be a rational basis for the state's classifications of the electorate by a demonstration that "the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." *Levy v Parker*, 346 F. Supp. 897, 902 (E.D. La. 1972), *aff'd*, 411 U.S. 978 (1973); *see also, Corning v Board of Elections of Albany County*, 57 N.Y.2d 746, 440 N.E.2d 1326, *aff'g* 88 A.D.2d 411 (3d Dep't 1982).

The Second Circuit erred in its determination that the state statute here in question was subject to the strict scrutiny test. The court below held that primary election eligibility requirements were not subject to the qualifications provision of article I, section 2 and the Seventeenth Amendment, and that Conn. Gen. Stat. § 9-431 unduly interfered with the political party's associational rights, derived from the First Amendment, thus requiring the statute to meet a strict scrutiny test. *Tashjian*, 770 F.2d at 275, 283. This conclusion, based upon the court's faulty interpretation of article I, section 2 and the Seventeenth Amendment, is wrong. Where, as here, the constitutional right to associate is regulated by the state's proper exercise of its power to set voter qualifications, the state statute will be subject to strict

scrutiny only if it places a substantial burden on the party's associational rights. Even the Second Circuit recognized that any intrusion by the State of Connecticut on the associational rights of the Republican Party of the State of Connecticut was "indirect", and only affected the Party "to some [limited] extent".[12] 770 F.2d at 282-283. The fact that the effectiveness of associational activity is impaired in some way does not mean that the regulation is an unconstitutional burden on the group's associational rights. *See Smith v Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979); *Brown v Alexander*, 516 F. Supp. 607, 614-615 (M.D. Tenn. 1981), *aff'd* 718 F.2d 1417 (6th Cir. 1983). Thus, the statute here in question need only meet the rational basis test.

Conn. Gen. Stat. § 9-431, like similar statutes in many other states, has such a rational basis. It allows the State to protect the integrity of the primary nominating process and to preserve an orderly and controlled means of determining party nominees for placement on the general election ballot. *Cf. American Party of Texas v White*, 415 U.S. at 781. The prospect of a system which would allow each political party in each state to determine who may vote in its primary, with virtually no limitation on the frequency or extent to which a party could make such changes, raises the specter of nomination by the "smoke-filled room" process.[13] If a party were left as free as the Second Circuit would have it to change the rules as to who may vote in a primary, the party leadership, with control of the rule-making process, could alter party procedures such that its desired nominee would be most likely to prevail at the primary, thereby giving the leadership the effective power to determine the party's candidate. It was the desire to protect against such misuse of power, certainly

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[12] The bracketed word "limited" was contained in the court's original opinion, but does not appear in the reported version of the decision. Appendix to Jurisdictional Statement at 111.

[13] Lowell P. Weicker, Jr., one of the appellees in this case, filed an *amicus curiae* brief in *Nader v Schaffer*, in which the process of nomination by the party leadership, described as the "smoke-filled room", was presented.

not unknown in our Nation's history. that led to the State's regulation here, and there can be small doubt that this is a rational basis.

Further, the states have responsibilities designed to insure fair, honest elections, such as ballot preparation and certification of results, which could be disastrously affected by a broad rationale of associational rights which in reality leaves the decision-making power with the parties. Thus, Connecticut's statute, like that of other states, has a rational basis and is a proper exercise of the State's constitutional right to regulate primary elections.

The Second Circuit's rationale for holding Conn. Gen. Stat. § 9-431 unconstitutional is overly broad. By finding that primary elections are not subject to the qualifications requirements of the Constitution, the court has, in effect, eliminated the authority for the states to regulate primary elections in any significant way. Although the decision spends a great deal of time discussing historical commentators, such as DeTocqueville, on the right of association, there is no historical discussion of the genesis of primary elections and their role in the party system. *Tashjian*, 770 F.2d at 275-276. This glaring omission, together with the court's failure to consider today's political reality, results in an opinion which effectively grants political parties the sovereign power of the state with regard to primary elections.

For example, in New York State the regulation of primaries originated in an attempt to make the parties truly representative of the people. Moscow, *Politics in the Empire State*, 55-56 (1948); Peel, *The Political Clubs of New York City*, 153-155 (1968); Mushkat, *The Reconstruction of the New York Democracy, 1861-1874* (1981). To a great extent, primary regulation was a reaction to the political mores of the day, which included "Bossism", smoke-filled rooms, and the political machinery of Tammany Hall. *Stebbins*, Political History of the State of New York (1913); *Forrest & Malcolm*, Tammany's Treason (1913). To say now, as the Second Circuit does, that these groups cannot be subject to any state regulation because of the vaguely-defined associational rights of political parties, is to invite a return to the politics of

one hundred years ago. It is not unduly speculative to conjecture that if the way in which parties define their membership and their endorsement of candidates can no longer be regulated in an even-handed matter by the state, control of the political parties once again may fall to a few powerful interest groups.

The importance of state regulation of the primary system has been noted by the courts for many years:

> It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election or by party convention.

American Party of Texas v White, 415 U.S. at 781; *see also, Storer v Brown*, 415 U.S. at 733-736. A primary election, furthermore, is not wholly a private party matter. When the electorate votes in a primary, it is engaged in the process of selecting persons to fill public office, which is clearly a matter of state concern. *Lynch v Torquato*, 343 F.2d 370, 372 (3d Cir. 1965); *see also, Rivera-Rodriguez v Popular Democratic Party*, 457 U.S. at 12 n.12. It has been widely recognized that these elections can, therefore, be regulated by the state. *Anderson v Celebrezze*, 460 U.S. 787-789; *Democratic Party v Wisconsin*, 450 U.S. 111 n. 4; *Illinois State Board of Elections v Socialist Worker Party*, 440 U.S. 184-185; *Jenness v Fortson*, 403 U.S. 432; *Smith v Allwright*, 321 U.S. 657; *Socialist Worker Party v Fong Eu*, 591 F.2d at 1261. The Second Circuit decision leaves no room for regulation of this or any other type, and has the potential to undo one hundred years of election law reform.

In New York, political parties did not enjoy any special status at common law; they are wholly a statutory creation. New York Election Law, §§ 2-100 - 2-128. The statutory scheme regulates every aspect of the party, including the creation of state and local party committees (*id.*, § 2-100); national party conventions (*id.*, § 2-122); and party funding (*id.*, § 2-126). It is anomalous for the Second Circuit to say, after the state has created the party,

that the associational rights of the party crea' ' an exemption from state regulation. The very act of creating the party constitutes regulation, as it distinguishes the party from other, less well-defined political entities.

New York grants special privileges and protections to its major political parties. The authority to place candidates on the general election ballot is delegated, to a great extent, to the political parties. New York Election Law, §§ 6-120, 6-124, 6-126. Furthermore, the cost of primary elections, which include the selection of party officials (*id.*, §§ 2-110, 4-110, 6-134, 7-116), is assumed by the State. *Id.*, §§ 4-136, 4-138. It is not unreasonable to allow the State some say in how these primary elections are conducted, especially when the parties participate pursuant to the privilege granted by the State. Justice Holmes has addressed this issue in the following way:

> It would be a strange inversion to say that no laws can be passed upon the mode of voting at a preliminary meeting held only for the purpose of getting names printed upon an official ballot when laws can be passed affecting the final vote. *The Legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage.*

Commonwealth v Rogers, 181 Mass. 184, 63 N.E. 421, 423 (1902) (emphasis supplied). Under the Second Circuit's ruling, the State could not regulate these matters.

The idea of a primary election itself arises from the notion that the leadership of a political party is not totally free to determine who it may nominate. In order to enjoy the privileges granted to the parties by the State, such as representation on county boards of election (New York Election Law, § 3-200[2]), the parties must act in accordance with the State's legitimate regulatory concerns. This process ensures that fairness prevails. *Anderson v Celebrezze*, 460 U.S. 780; *Democratic Party v Wisconsin*, 450 U.S. 107. Parties are granted these privileges because they institutionalize identifiable political bases of broad support among

the populace. *Jenness v Fortson*, 403 U.S. at 439-441. If the right of association is as broad as that delineated by the Second Circuit, the significance of the party as a representative of an ideology or an identifiable group of voters becomes meaningless. Indeed, under the rationale of the Second Circuit decision, a state lacks the power to compel that a primary election be held at all. If the party leadership were to decide not to hold a primary, they could effectively deny representation to a large part of the population. Such a proscription could turn the doctrine of associational rights into a prescription for the clubhouse politics of the past.

CONCLUSION

For all these reasons the State of New York, joined by the states of Alabama, Arizona, Delaware, Florida, Illinois, Louisiana, Maine, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee and Wyoming, as *amici curiae*, urge this Court to reverse the ruling of the Court of Appeals for the Second Circuit and hold that Conn. Gen. Stat. § 9-431 is constitutional.

Dated: Albany, New York
February 27, 1986

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In The Supreme Court Of The United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF WILLIAM J. CIBES, JR. (Associate Professor of Government, Connecticut College), CLYDE McKEE (Professor of Political Science, Trinity College), SARAH McCALLY MOREHOUSE (Professor of Political Science, University of Connecticut at Stamford), WAYNE R. SWANSON (Professor of Government, Connecticut College), POLITICAL SCIENTISTS, IN SUPPORT OF APPELLANT

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L. Tribe, *American Constitutional Law* (1978) 8, 9, 10, 18

STATEMENT OF INTEREST OF AMICI

Amici who have joined this brief are professors of political science at colleges located in the state of Connecticut. In that capacity, amici teach and study the political party system as it pertains to government, particularly in Connecticut, where they live and work. Because of this convergence, amici have a special insight into the party system and election process in Connecticut. Amici believe that the state legislature acts properly in regulating participation in primary elections so that those who associate with political parties are protected from those who attempt to intrude upon their association.

In addition, an author of this brief, William Cibes, is a state representative as well as an associate professor of political science. He thus brings a unique perspective to the issues facing the Court in this matter.

The parties to this appeal have consented to the filing of this brief by amici, and the consent letters are filed with this Court.

SUMMARY OF ARGUMENT

Those who challenge a state's regulation of primary elections on the ground that the freedom of association of members of a political party is thereby violated must first demonstrate that the action of the state has substantially infringed the protected right to associate for political purposes. This Court has clearly delineated, in a series of cases, criteria for determining when such a substantial infringement has occurred. A severe burden on the right to associate is imposed if a party is prevented from attracting new members to its ranks, thus freezing the political status quo. A substantial infringement occurs if a state a) forces a political party to accept members it does not desire, b) regulates purely internal, non-electoral processes of the party, or c) infringes on intrinsic aspects of a completely private organization. There may also be a significant burden if the regulation of the state has an extra-territorial reach. Since none of these criteria of "substantial infringement" is present in this case, and since no substantial infringement in fact occurs in this case, the state need not demonstrate that it has a compelling interest in restricting to members of a political party the right to participate in a primary election of that party. Instead, the state need only demonstrate the legitimacy of its interest in adopting the statute at issue here. As amici political scientists will demonstrate, a state has a legitimate interest in preventing major political parties from making short-term expedient decisions which undermine the long-term integrity of the electoral process. Because the Circuit Court has erred in requiring that Connecticut show a compelling interest in regulating the participation of unaffiliated voters in primary elections, this Court should reverse the decision of the Court below.

ARGUMENT

I. BEFORE ASSESSING THE STATE'S INTEREST, A COURT MUST FIRST DETERMINE THE EXTENT TO WHICH BARRING UNAFFILIATED VOTERS FROM PARTICIPATING IN A PARTY PRIMARY ELECTION INFRINGES ON THE PARTY MEMBERS' FREEDOM OF ASSOCIATION.

The constitutional analysis which this Court should apply in the instant case is a straightforward extension of *Marchioro v. Chaney*, 442 U.S. 191 (1979), a case not considered by either of the lower courts here.

Marchioro recognizes a constitutional collective freedom of association possessed by members of political parties, as well as a basis for state regulation of certain activities in which political parties engage, and provides a procedural and substantive guideline for judicial reconciliation of these often conflicting principles. That guideline procedurally requires that a court first determine whether the freedom of association is substantially infringed by state regulation. If it is, but *only* if it is, the court must evaluate whether the state has a compelling interest in regulating the activity. Otherwise, the state need only show a legitimate interest in the regulation in question.

Substantively, this two-step procedure permits the recognition that all assertions of a political party's right to be free from regulation are not equally precious. State regulation may, for example, prevent the very existence of a party as an expressive association. Surely the state must then demonstrate a compelling interest in destroying the party's ability to communicate a coherent message. On other occasions, as here, the regulation of the state may be minimal, not precluding or penalizing the exercise of an essential expressive function. In such a situation, *Marchioro* permits the power of the state to be employed if the state can demonstrate a valid, rational reason for its action, as it has done here.

Some statements by lower courts, especially when the exercise of state regulatory power over primary elections was first questioned, may be read broadly to appear to grant an almost total discretion to states to regulate at least those activities of political parties which touch on elections. An early South Dakota decision, quoted in a 1920s study of primary elections, asserts that " 'we are aware of no decision wherein it is held that the legislature is without power to prescribe any mandatory rule whatever for the regulation of party procedure so far as it concerns nominations to public office.' " *Healey v. Wipf*, 22 S.D. 343, 117 N.W. 521, 522 (1908), as quoted by C.E. Merriam and L. Overacker, *Primary Elections* 119 (1928). The statement by this Court in *Storer v. Brown*, 415 U.S. 724 (1974), that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases," *id.* at 730, might also be read, standing alone, to confer this Court's imprimatur on any election-related state statute. A three-judge district court in Connecticut has also observed that "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso*, 315 F. Supp. 513, 519 (D. Conn. 1970). Such observations might appear to justify any state law which could be interpreted to affect an election, regardless of the remoteness of the impact, or the adverse effect it might have on associational freedom.

But there must be limits to such state regulation, lest it be possible "for a Democratic legislature to make the test [of party allegiance] at a primary election a belief in free coinage of silver, or Republicans to make adherence to a protective tariff a requirement," as Merriam and Overacker, *supra* at 125, summarize a California court's opinion. Although primary election laws "regulating the internal affairs of a political party" were "universally conceded to be constitutional," Merriam and Overacker observe that "[t]he courts were careful to point out . . . that this legislative power to regulate party affairs must be exercised within the bounds of reason and not arbitrarily." *Supra* at 120.

On the other hand, appellee Republican Party in this case essentially argues that the freedom of collective association constitutionally prevents the state of Connecticut from statutorily barring voters unaffiliated with the Party from voting in a primary election to nominate candidates of the Party if the Party, by Party rule, decides to permit such unaffiliated voters to participate. Specifically, appellees' claim in this case is that the state of Connecticut, in pursuing the goal of protecting the members of a political party from intrusion by others, may do so only if it has demonstrated a compelling interest.

Such an argument stands the freedom of collective association on its head. Those commentators who have addressed the issue have almost uniformly defended a collective freedom of association because of their belief that political parties should be free from intruders, thrust upon them by state action, who could distort the collective choice of those who are members of the group. See S. Gottlieb, "Rebuilding the Right of Association: the Right to Hold a Convention as a Test Case," 11 Hofstra L. Rev. 191 (1982), C.L. Carr and G.L. Scott, "The Constitutionality of State Primary Systems: An Associational Rights Analysis," 10 J. Contemp. Law 83 (1984) and G.L. Scott and C.L. Carr, "Political Parties Before the Bar: The Controversy Over Associational Rights," 5 Univ. of Puget Sound L. Rev. 267 (1982). Dicta in a number of cases in this Court and in lower courts indicate a similar reason for insisting on the right of association. *See, e.g., Cousins v. Wigoda,* 419 U.S. 477 (1975), *Democratic Party of the United States v. Wisconsin ex rel. LaFollette,* 450 U.S. 107 (1981), and *Roberts v. Jaycees,* U.S. , 104 S.Ct. 3244 (1984).

It would indeed be ironic should the freedom of collective association now be applied to prevent the state of Connecticut from achieving an end which the freedom of association is supposed to facilitate: the protection of groups from invasion by those with different beliefs.

II. DECISIONS OF THIS COURT HAVE ESTABLISHED THE STANDARD FOR EVALUATING WHETHER LEGISLATIVE ENACTMENTS, SUCH AS CONNECTICUT'S PROHIBITION OF UNAFFILIATED VOTER PARTICIPATION IN PARTY PRIMARY ELECTIONS, UNCONSTITUTIONALLY INFRINGE FREEDOM OF ASSOCIATION.

This Court, in a long line of cases dealing with the power of a state to regulate various activities of a political party, has clearly and undeviatingly established the standard of review to be applied, a standard fully elaborated in *Marchioro* and other cases. A judicial inquiry must *first* determine if a state law imposes "substantial burdens on the freedom to associate" or if only "minor restrictions on associational activities" are imposed. Note, "It's My Party and I'll Cry If I Want To: State Intrusions Upon the Associational Freedoms of Political Parties—*Democratic Party of the United States v. Wisconsin ex rel. LaFollette*," 1983 Wis. L. Rev. 211, 220. Only then does the court proceed to the second step of the analysis, which varies according to the decision at the first step.

If, on the one hand, as in *Democratic Party, supra*, the Court finds a "substantial intrusion into the associational freedom of members of the National Party," *id.* at 126, the Court must then consider "whether the State has compelling interests that will justify the imposition of its will" on the party. *Id.* at 124. In *Kusper v. Pontikes*, 414 U.S. 51 (1973), this Court first considered whether the statute there at issue "substantially restrict[ed]" the voter's right to change his affiliation, *id.* at 57. Only when it had determined that there had been a "significant encroachment upon associational freedom," *id.* at 58, did it proceed to evaluate the extent of Illinois' interest, stating that the interference "could not be justified upon a mere showing of a legitimate state interest." *Id.* at 58. In *Cousins v. Wigoda, supra*, this Court also apparently first considered the petitioners' contention that the injunction there at issue was a " 'significant interference' with

protected rights of political association." *Id.* at 488. Only then did it proceed to determine if "Illinois had a compelling interest." *Id.* at 489. Also apposite to this inquiry is *Storer v. Brown*, 415 U.S. 724 (1974), dealing with a California disaffiliation requirement for candidates. Citing *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court stated the requirement that there first must be a finding that the statute "severely burdened the right to associate for political purposes;" if so, then the discriminations "had to be justified by compelling state interests." *Storer, supra* at 729. In each instance, the plaintiff had to meet the initial burden of showing that his associational right had been substantially restricted before the Court would even consider whether the state's interests were compelling.

If, on the other hand, as in *Marchioro v. Chaney, supra*, this Court finds that "there can be no complaint that the party's right to govern itself has been substantially burdened by statute," *id.* at 199, this Court then must only determine if the state's interest is "legitimate." *Id.* at 196. The *Marchioro* Court specifically distinguished *Cousins:* "In *Cousins*, unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite." *Id.* at 199 n.15. Moreover, it summarized with approval the ruling of the Washington Supreme Court:

> The state court reasoned that although " 'substantial burdens' " on the right to associate for political purposes are invalid unless " 'essential to serve a compelling state interest,' " these appellants failed to establish that this statute had imposed any such burden on their attempts to achieve the objectives of the Democratic Party. Since this initial burden had not been met, the court upheld the constitutionality of the challenged statute.

Id. at 195 (footnote omitted).

The standard employed in these cases confirms "the analytic paradigm employed in determining the constitutionality of state impingements upon party autonomy" which one leading commentator suggested in 1978: "mild restrictions on political parties must relate rationally to some legitimate state interest; if a state rule substantially erodes the freedom of association of party members, however, the rule will be upheld only if it is shown necessary to serve a compelling state interest." L. Tribe, *American Constitutional Law* 786 (1978).

In the instant case, however, the Circuit Court "was constrained to conclude" only that *"to some limited extent"* Connecticut had placed restrictions on the state Republican Party. See J.S. App. at 111 (emphasis added). Despite this evaluation, the Circuit Court then held, in a clear misapplication of this Court's rulings, that the compelling interest test must be used to determine whether the regulation was constitutionally justified.

III. THERE HAS BEEN NO SUBSTANTIAL INFRINGEMENT OF APPELLEES' FREEDOM OF ASSOCIATION.

As in *Marchioro v. Chaney*, the "initial burden," *supra* at 195, of demonstrating that the state has imposed a substantial restriction on the right of association has not been met. This Court has not left lower courts in the dark in defining the standard to be applied, but has clearly established criteria for measuring "substantial burden."

A. The Party's Associational Right To Attract New Members Is Not Substantially Burdened.

Connecticut has not substantially interfered with the right of members of the Republican Party to associate with whomever they desire to attract to membership in their party.

Unlike the requirement which locked a voter into a pre-existing party affiliation, declared unconstitutional by this Court in *Kusper v. Pontikes, supra*, and even unlike the delayed-enrollment scheme upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), Connecticut specifically permits Connecticut Republicans to continue to attract party members by permitting them to affiliate with the party until noon of the business day before a primary election. Conn. Gen. Stat. § 9-56. There is no 23-month waiting period before affiliation takes effect, which in essence "absolutely preclude[d]" the appellee in *Kusper* from voting in her chosen party's primary, and thus absolutely barred members of that party from attracting her support during that period. *Kusper, supra* at 58. The statute here "does not freeze the status quo," *Anderson v. Celebrezze*, 460 U.S. 780, 806 at 817 (1983) (Rehnquist, with White, Powell, and O'Connor, dissenting) which all Justices of this Court agreed was impermissible in the context of filing deadlines on presidential candidates imposed by Ohio. *Id.* at 794.

Even if it may be assumed, *arguendo*, that it is crucial to a party's electoral success at the general election to attract new members during the primary election campaign—an assumption which may be empirically baseless—the state erects no substantial barrier here. The Party is able to place a host of potential candidates for its nomination in the field. They may campaign actively, seeking the support not merely of party members, but of unaffiliated voters, free to solicit and encourage them to affiliate with the party and add to its numbers, *until the day before the primary election.* All that is minimally required is that those whom the party is able to attract to its ranks declare their allegiance to the party by registering with it one day before they cast their vote.

Professor Tribe concludes, after an analysis of *Kusper, supra*, and *Rosario, supra*, that "contemporaneous affiliation," a requirement essentially similar to Connecticut's one-day waiting period, is justifiable. In terms as applicable to the party members' collective freedom of association as to an individual's right to associate, he suggests that "[a]bsent a

willingness to profess such affiliation, it would be tenuous to assert that substantial associational rights were being abridged; without a commonality of interest, there is little association to abridge." Tribe, *supra* at 793.

B. Connecticut Has Not Substantially Interfered With The Internal Organization Or Affairs Of The Group Which Has Associated To Pursue Political Ends.

1. The state is not forcing the Party to accept members who may distort its views.

Unlike the Illinois state law found to be superseded by the decision of the Democratic national convention in *Cousins v. Wigoda, supra,* unlike the Wisconsin rule which bound the Wisconsin delegates to the national party convention to honor the results of the Wisconsin open primary in voting for presidential candidates, declared void in *Democratic Party, supra,* and unlike certain other government actions referred to in *Roberts v. Jaycees, supra,* as infringing on the right to associate for expressive purposes, the Connecticut statute does not intrude "into the internal structure or affairs of an association" in that it does *not* "force[ ] the group to accept members it does not desire." It does *not* "impair the ability of the original members to express only those views that brought them together." *Roberts v. Jaycees, supra* at 3252. Like the Minnesota Human Rights Act upheld by the Court in *Roberts,* the statute "requires no change in . . . creed . . . and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of existing members." *Roberts, supra* at 3254. On the contrary, the Connecticut statute here at issue, Conn. Gen. Stat. § 9-431, seeks to *protect* the associational rights of members of the Republican Party from interlopers.

2. The state is not hindering the Party's internal, non-electoral decision-making process.

Unlike the actions of Illinois in *Cousins v. Wigoda, supra,* which sought to override the internal rules of the Democratic Party for the selection of delegates to be seated at its national convention, and unlike the Wisconsin statute in *Democratic Party v. Wisconsin, supra,* which bound by state law votes of delegates to the national convention, the Connecticut statute here in question does not deal with the *internal* processes of the Republican Party, but with a primary election which determines which candidate will be granted access to the general election ballot.

Marchioro v. Chaney, supra, clearly distinguishes " 'purely internal party decisions,' " *id.* at 197, from the "critical role played by political parties in the process of selecting and electing candidates for state and national office." *Id.* at 196. This Court classified as internal functions the State Committee's power to

> act as the party's governing body when the Convention is in adjournment [,] . . . authority to organize and administer the party's administrative apparatus, to raise and distribute funds to candidates, to conduct workshops, to instruct candidates on effective campaign procedures and organization, and generally to further the party's objectives of influencing policy and electing its adherents to public office.

Id. at 193.

Regulation of these matters might well be a significant infringement of associational freedom. However, statutes which regulate "the orderly participation of the political party in the electoral process," *id.* at 197, are supportable. "The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter, there must be a substantial regulation of elections

if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Id.* at 196, quoting *Storer v. Brown, supra* at 730.

In the instant case, the Connecticut Republican Party does not even purport to be defining criteria for party *membership*. The Party rule involved here does not deal with membership in the Party *per se*, or with standards for determining membership—because those who vote in the primary do *not* by that act become party members—but only with who may participate in the state *electoral* process of selecting people who will receive the party's nomination for state office. This matter clearly falls under the rubric of electoral decision-making and hence is not internal.

3. The Party is not a purely private organization.

Unlike the various state actions which sought disclosure of the membership lists of private organizations, such as those struck down in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), and unlike other statutes considered in cases cited in *Roberts v. Jaycees, supra* at 3250–52, the Connecticut statute here does not regulate a purely private organization, the members of which have an "intrinsic" right to "enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 3249. The Republican Party is not distinguished by its "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 3250. Indeed, the names of those affiliated with the Republican Party or any other political party are open to anyone for public inspection, and are disseminated widely so that the affiliated voters may be targeted to receive information. Conn. Gen. Stat. § 9-55. There has been no showing in this case that the Party

"employs any criteria for judging applicants for membership." *Roberts, supra* at 3251.

As the Fourth Circuit Court of Appeals observed in another context in *Rice v. Elmore*, "The fundamental error in [South Carolina's] position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery." 165 F. 2d. 387, 389 (4th Cir. 1947) (footnote omitted).

C. The National Party's Rules And Decisions Are Not Regulated By The State, And The Connecticut Statute Has No Extra-Territorial Reach.

This Court has never expressly ruled on the question of whether states may regulate the conduct of primary elections by *state* parties which determine the party's nominee in a *state* election. The majority in *Cousins* emphasized that "the only question that we decide today," *id.* at 483 n.4, is "whether the Appellate Court was correct in according primacy to state law over the National Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention," *id.* at 483, a view with which Justice Powell agreed: "state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance." *Id.* at 496, 497 n.* (Powell, J., concurring and dissenting).

But unlike the injunction overturned in *Cousins, supra*, unlike the statute struck down in *Democratic Party, supra*, and unlike the early filing deadline for Presidential candidates declared void in *Celebrezze, supra*, the Connecticut statute does not have extra-territorial application. It does *not* "seriously undercut or indeed destroy the effectiveness of the National Party Convention" which "serves the pervasive

national interest in the selection of candidates for national office," which "national interest is greater than any interest of an individual State." *Cousins v. Wigoda, supra* at 490. Here no state restriction is imposed on a "nationwide electoral process," which the "State has a less important interest in regulating . . . than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze, supra* at 795.

Indeed, the possibility of conflict between state regulation and national rules does not even arise with the Republican Party in Connecticut, or in any other state. In the one instance in which a conflict might exist, in the selection of delegates to the national convention, "Republican rules maintain that state laws shall govern in any conflict with state party procedures." Note, "Freedom of Association and State Regulation of Delegate Selection: Potential for Conflict at the 1984 Democratic National Convention," 36 Vand. L. Rev. 105, 105 n.3 (1983).

IV. CONNECTICUT'S LEGITIMATE INTERESTS IN ADOPTING THE REGULATION HERE INCLUDE ENCOURAGING PARTY COHESION, SHARPENING POLITICAL DEBATE, AND PREVENTING DISTORTION OF THE ELECTORAL PROCESS.

Although states which adopted statutes or regulations possessing any of the foregoing attributes might be required to demonstrate a compelling state interest, Connecticut need only show that it had a legitimate state interest in adopting the statute here in question. On the basis of the important ends to be achieved, and on the authority of prior cases, it can accomplish—and indeed has accomplished—that task.

The legitimate interest of the state in regulating primary elections was in early cases justified in part as a protection

against fraud, bribery and other evils, in part because of the sovereign power of the state, and in part as a logical extension of the adoption of the "Australian ballot" (a secret ballot listing all candidates who qualify for an office, prepared, distributed and tabulated by government officials at public expense, used by all states since 1888).

> The easiest, and what might be termed the typically legal, method of upholding a primary law is to declare that its provisions are a part of the Australian ballot law. Since certain parties are accorded under this plan special privileges upon the ballot, they must in return submit to special requirements. The privilege of having the names of candidates placed upon the ballot upon certification of party officials, instead of by petition, is, so the argument runs, to be paid for by minute legal regulation of the procedure of the party.
>
> Justice Holmes stated this clearly when he said in *Commonwealth v. Rogers:* "The legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage"—that is, the right to have the names of candidates placed upon the ballot without a petition.

Merriam and Overacker, *supra* at 119, quoting Holmes in *Commonwealth v. Rogers,* 181 Mass. 184, 63 N.E. 421, 423 (1902). *See generally,* Merriam and Overacker, *supra* at 108–140.

The state recognizes and encourages major political party participation in the electoral process by establishing a state-funded and regulated system of conventions and primaries leading to the general election. The major parties may choose to utilize this route for nomination of their candidates in the general election, or members of those parties may use alternative methods, such as petitioning, to qualify candidates for the ballot. The Republican Party in this case seeks to use the first alternative, the state created primary system, while at

the same time undermining that system and causing confusion among the parties and voters. The state certainly has a legitimate interest in maintaining order, political coherency, and stability in the nominating process it created.

Ultimately, however, the most important interest to be protected by state regulation of the party affiliation of voters in primary elections is the enhancement of the quality of political debate through clear articulation of competitive policies by cohesive political parties. A state may legitimately foster the development of a political system in which the short-term interests of a temporary candidate coalition do not undermine the long-term interest of the public in a robust debate. A state may legitimately wish to encourage positions on issues which are clearly defined and carefully framed by the members of a party who have consciously determined that they want to associate themselves with others of a like mind. A state may legitimately choose to prevent the circumvention of the members of an association by intruders who temporarily intervene "not in order to support a principle or policy," C.A. Berdahl, "Party Membership in the United States, I," 36 Am. Pol. Sci. Rev. 16, 42 (1942), but to gain an advantage by fragmenting, rather than solidifying, the association.

As this Court summarized in *Anderson v. Celebrezze*, *supra*, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *id.* at 788, such as those "that protect the integrity and reliability of the electoral process itself." *Id.* at 788 n.9. Specifically, a state "has the right to prevent distortion of the electoral process," *id.*, which can occur when voters not affiliated with a party decide to cast ballots in that party's primary. Whether impelled by a deliberate desire to seek the nomination of the candidate least likely to win the general election, or simply attracted by an exciting campaign, independent or unaffiliated voters can dilute the preferences of party members, an outcome which the state has a legitimate interest in preventing.

Courts have recognized that a "state has a legitimate interest in protecting party members' associational rights, by legislating to protect the party 'from intrusion by those with adverse political principles,' " as a three-judge District Court wrote in 1976 concerning the statute here at issue. *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976), *aff'd mem.*, 426 U.S. 989 (1976), quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952). The *Nader* court continued:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies, and preventing fraudulent and deceptive conduct which mars the nominating process."

Nader v. Schaffer, supra at 845.

In a subsequent, similar case, the Supreme Court of New Jersey referred to at least two important interests served by a closed primary election system with a durational affiliation requirement. "First, such a system supports the associational rights of party members." *Smith v. Penta*, 81 N.J. 65, 77, 405 A.2d 350, 356 (1979). Excluding non-members of the party prevents "an erosion in the cohesive partisanship that is basic to the party's strength." Because participants in the primary are not merely members of the general public, but those who adhere to a particular political philosophy, party members may "advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power." The court concluded that "[t]hese interests—and others as well—are the associational values which state legislation may properly protect." *Id.* The state also has a second "strong public interest in maintaining the integrity of the electoral process." *Id.*

This Court has reached a similar conclusion concerning the legitimacy of establishing a cutoff point for registration or party enrollment in New York: the purpose of New York's statute was to "inhibit party 'raiding,' whereby voters in sympathy with one party"—not just members— "designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller, supra* at 760. This Court then said, "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Id. at 761. This Court also referred to the "legitimate interest of Illinois in preventing 'raiding,' " in *Kusper, supra* at 61, even though the particular method chosen did not pass constitutional muster.

Certainly, this Court has recognized that protection of party members from intrusion by others is in general a necessary concomitant of the freedom of association. In *Democratic Party,* this Court stated—there in reference to a political party's own rules which excluded non-party members from selection of delegates— "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to *limit* the association to those people only." *Supra* at 122 (internal citation omitted and emphasis added). This Court then cited with approval Professor Tribe's comment that " '[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' " L. Tribe, *supra* at 791, quoted in *Democratic Party, supra* at 122 n.22. The Court added that it had recognized on several occasions "that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions." *Id.* at 122. Protecting the political party members' associational rights is not only a legitimate interest of the state but essential to its protection of the integrity of the electoral process.

V. POLITICAL SCIENTISTS HAVE CONCLUDED THAT DISTORTION OF THE VIEWS OF PARTY MEMBERS MAY OCCUR IN PRIMARY ELECTIONS OPEN TO ALL VOTERS, THUS DIMINISHING THE COHESIVENESS OF THE PARTY, AND ACCORDINGLY HAVE SUGGESTED THAT UNAFFILIATED VOTERS BE BARRED FROM PRIMARY ELECTIONS.

The very reason a political party exists is to articulate and fight for the implementation of certain public policies. Those policies, and the principles underlying them, flow from the expressed desires of members of the political party.

At the same time, a political party, the policies it espouses, and its candidates are intertwined inextricably. Candidates personify the party, and thus the selection of a candidate is one of a political party's most important functions. As E.E. Schattschneider, perhaps the foremost analyst of American political parties in this century, has said, "The nominating process thus has become the crucial process of the party. The nature of the nominating procedure determines the nature of the party; he who can make the nomination is the owner of the party." E. Schattschneider, *Party Government* 64 (1942).

Members of political parties nominate their candidates for public office by convention, by direct primary, or by a challenge primary following a convention. The latter scenario occurs in Connecticut when a candidate receives more than twenty per cent of the votes cast by the delegates to a convention, and chooses to press his candidacy further. See Conn. Gen. Stat. §§ 9-400, 415.

When a party chooses its candidates for a general election at a convention, it usually also adopts a platform stating its principles. That platform, on which its candidate stands, is likely to be a model desired by the leading candidate for the party's nomination, whose supporters—members of the political party—dominate not only the nomination process,

but also the process of building the platform. S. Morehouse, *State Politics, Parties and Policy* 190 (1981).

When a candidate is chosen through the mechanism of a primary election, the only political principles defended by the party are those espoused by the winner of the primary. In the case of a challenge primary, like Connecticut's, the platform adopted by the convention will have been bypassed if the winner is other than the nominee of the convention. The political principles for which the party campaigns are accordingly defined, either in a direct primary or a challenge primary, by the voters who participate in that primary.

If those participants are the same as those who associate with each other, as members of a party, for the purpose of influencing public policy in a particular way, then no problem exists. But if others, including some who have formally associated with another party, participate in that primary, and they have candidate preferences which differ from those of the members of the party that is conducting the primary election, then the principles which the members of the party favor will have been distorted by the intruders.

It is possible, in the abstract, that independents and self-declared members of party B would choose not to participate in the primary of party A, even if they were permitted to do so. And it is also possible that, since there are either no tests for party membership, or the tests are unenforceable, members of party B could dissemble and declare themselves to be members of party A and participate in party A's primary even when they supposedly were excluded. J. Lengle, *Representation and Presidential Primaries: The Democratic Party in the Post-Reform Era* 100 (1980). But research has found that either possibility occurs only minimally in actual practice. Political scientists Hedlund, Watts and Hedge have observed that more than forty per cent of the voters in the open Wisconsin presidential primaries from 1968 through 1980 were not members of the party in whose primary election they voted. And the same authors observed that less than five per cent

of party identifiers voted in the other party's primary in 1976 in Florida, Pennsylvania, and California, where primaries were closed. R. Hedlund, M.W. Watts, and D.M. Hedge, "Voting in an Open Primary," 10 Am. Pol. Q. 197, 201-04 (1982).

It is also possible that the candidates, and thus the political principles, favored by party affiliators do not differ from the candidates and political principles favored by those who do not ally themselves with the party but vote in the primary election anyway. Recent research has demonstrated, however, that results of open primaries are in fact different from the results which would occur in those elections if they had been closed to outsiders. Professor Gary Orren has concluded that Gary Hart "owed to independents his margin of victory [over Walter Mondale in the 1984 Democratic primaries] in several states that permitted independents or Republicans to pick up Democratic ballots. These included New Hampshire and Indiana, where he ran just even with Mondale among Democrats, and Ohio, where he won the primary even though he lost the Democratic vote." G. Orren, "The Nomination Process: Vicissitudes of Candidate Selection," in *The Elections of 1984* at 27, 66-67 (M. Nelson ed. 1985) (internal footnote omitted). To the extent that Hart's victories in those states made his campaign for the nomination appear more viable for a longer period of time, the expressed preferences of those voters unaffiliated with the Democratic party weakened the candidacy of the contender favored by those who were members of the association.

Similar distortions occurred in the 1972 Democratic presidential primaries in Wisconsin and Michigan, both of which were open to voters other than members of the Democratic party. In both states, the candidate preferences of non-Democrats differed from those of Democrats: in Wisconsin, Hubert Humphrey would have narrowly defeated George McGovern if the contest had not been open to Republicans and independents. With the votes of these intruders, however, McGovern won convincingly: "the victory reinvigorated his slumping campaign." Although the order

of finish of the candidates would not have been altered in the Michigan open primary, Humphrey's share of the delegates chosen would have increased if the participants had been limited to Democrats. Political scientist James Lengle concludes that, in an open primary, "the effect of partisan-related candidate preferences is to distort both the voice of party members and the strength of the party's presidential contenders." Lengle, *supra* at 100, *see generally* 98–103. *See also* D. Adamany, "Cross-Over Voting and the Democratic Party's Reform Rules," 70 Am. Pol. Sci. Rev. 536 (1976), cited extensively by this Court in *Democratic Party, supra.* (Adamany's data, which indicated greater support for McGovern than he actually received, were, as the author states, somewhat contaminated by a halo effect, inasmuch as voters were not sampled until after the general election. Adamany, *supra* at 537.)

One may praise or condemn the results of these particular primary elections. The point is that those persons who associated with the party for the purpose of expressing their political views had their preferences as to candidates—and the policies consequently espoused by their party—altered or distorted because of interlopers in their association. Those intruders may not have been bent on "raiding"; they may have voted in that primary only because of the absence of an exciting race in the other party's primary. (Lengle did not believe that there was an organized Republican raid in the open Democratic primaries in either Wisconsin or Michigan in 1972. Lengle, *supra* at 102.) But their participation in the primary election on the same terms as *bona fide* members of the party nevertheless distorted the very expression of views for which the members entered into that association. As David E. Price concludes, "Open primaries dilute the impact of the parties' core constituencies." D. Price, *Bringing Back the Parties* 132 (1984).

The Committee on Political Parties of the American Political Science Association (APSA) anticipated these empirical findings when it made its recommendations in 1950. "The meaning of [party] membership itself suggests that those who

identify themselves with the group have something in common which they do not share with those outside it." Committee on Political Parties, *Toward a More Responsible Two-Party System* 66 (American Political Science Association, 1950). The APSA Committee accordingly recommended the adoption of the closed primary, because "it tends to support the concept of the party as an association of like-minded people. On the other hand, *the open primary tends to destroy the concept of membership as the basis of party organization.*" *Id.* at 71 (emphasis in original).

Political scientists have observed that closed primary elections produce other benefits which are conducive to cohesive parties. The lists of party enrollees generated by registration prior to a closed primary are "invaluable tools for the parties as they undertake voter registration and get-out-the-vote drives and other efforts at communication and organization." Price, *supra* at 132. Because control of the nomination is in the hands of the same people who choose the leaders of the party organization, "candidates and officeholders have stronger incentives to work with party organizers and to support party positions." *Id.* Recruitment of candidates by party leaders may be facilitated because there is a greater assurance that the carefully chosen recruit will win the primary. Morehouse, *supra* at 177.

In addition, as V.O. Key observes, "the open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party." V.O. Key, *Politics, Parties, & Pressure Groups* 392 (5th ed. 1964). (Malcolm Jewell has hypothesized, contrary to Key, that in states with open primary laws, "minority parties might attract more interest in their primary, nominate candidates with broader appeal, and win more elections." M. Jewell, "Political Parties, Courts,

and the Nominating Process," Paper presented to the Southern Political Science Association, November 7-9, 1985, p. 10. But Jewell finds the evidence inconclusive: "If the closed primary is a serious obstacle to minority parties, this is most likely to be true in southern and border states where registration and primary turnout heavily favor the Democratic party." *Id.* at 11. Jewell observes, however, that only in North Carolina, Florida, and Tennessee have Republicans attracted large numbers of voters to their primaries, and "it is noteworthy that North Carolina and Florida are the only two southern states (except Louisiana) to have closed primary laws." *Id.* He concludes: "There is not yet convincing evidence that closed primary laws have significantly handicapped southern Republican parties in practice as well as in theory." *Id.* at 12. *See also* M. Jewell, *Parties and Primaries: Nominating State Governors* (1984), in which Jewell asserts that while it may be logical to think that "a closed primary benefits the majority party . . . it is difficult to find examples in specific states to prove it." *Id.* at 222.)

Moreover, the open primary may reduce the quality of debate about state policy issues. The need for candidates to make themselves attractive to the entire electorate at the primary stage may force them to de-emphasize the formulation of differences in policy between the parties and appeal to voters in what has become "the first round of the general election" on the basis of personality, image and "freewheeling candidate and issue appeals based outside the parties." Price, *supra* at 132.

Given the array of benefits of closed primaries and disadvantages of open primaries for the political system in general, political scientists have recommended that "party leaders and legislators in states with open-primary and same-day systems would do well to examine their debilitating effects on parties and to consider corrective action." Price, *supra* at 132. (In "same-day" registration systems, which require no party affiliation in advance, voters declare their preference for parties at the polls.)

As Sarah McCally Morehouse concludes her leading text on state politics, "It is certainly not too much to ask that those who help select the party nominee in a primary should be party members with more than a passing attachment to the party . . . . State laws should restrict voting in primaries to those who have registered with a party. . . ." S. Morehouse, *supra* at 488.

States need not follow the advice of the professors, of course, but should a state legislature conclude that it desires to adopt the public policy of strengthening the party system within its borders, there are certainly valid reasons to support the legislature's conclusion. The state would surely have at least a legitimate interest in fostering a cohesive party system, in preventing the dilution and/or alteration of the views of the members of political parties, and in protecting the associations formed to espouse the adoption of certain principles of public policy from intrusion by those preferring different policies and different candidates.

VI. DEPARTING FROM THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT, AND FOLLOWING THE CIRCUIT COURT'S ANALYSIS, MAY CALL INTO QUESTION MANY ELECTORAL LAWS OF THE STATES.

If this Court upholds the opinion below, amici submit that other state regulations of electoral activity may also be called into question. Political parties might be able to use their rule-making authority to exempt themselves, practically at will, from the ambit of such laws as those

—requiring a state convention to determine a political party's nominee for statewide office, Conn. Gen. Stat. § 9-382;

—guaranteeing a candidate for nomination, defeated by vote of a convention, the right to challenge the party's nominee in a primary if the loser received more than twenty percent of the convention's vote on any ballot, Conn. Gen. Stat. § 9-400;

—guaranteeing the right to a primary for offices voted upon only by electors in one town, Conn. Gen. Stat. §§ 9-405, 9-406;

—preventing members of another party—not just unaffiliated voters—from voting in a primary election, Conn. Gen. Stat. §§ 9-56, 9-59, 9-431;

—preventing voting by proxy or by absentee ballot in a primary by those who do not meet the qualifications for voting by absentee ballot, Conn. Gen. Stat. § 9-135;

—prohibiting corporate contributions to candidates in primary elections, Conn. Gen. Stat. § 9-336b;

—limiting the amount of contributions by an individual to a candidate in a primary election, Conn. Gen. Stat. § 9-348r;

—preventing non-residents of a district, or non-registered persons, including non-citizens or underage persons, from voting in primary elections, Conn. Gen. Stat. §§ 9-361, 9-431;

—permitting electors to seek judicial relief from decisions made by election officials concerning the procedures or results of a primary election, Conn. Gen. Stat. § 9-328.

Some of these regulatory statutes may be justified by a compelling state interest, and others may be justified by a legitimate state interest rather than a compelling one, but they would surely all be thrown into question by a decision of this Court overturning or limiting previous Court decisions and establishing the Circuit Court's standard as the one to be followed in cases of state regulation of primary elections.

CONCLUSION

Appellee Republican Party has contended in the instant case that the collective freedom of association of its members prevents the state of Connecticut from imposing by statute a requirement that only those voters who are affiliated with the Republican Party may vote in its primary elections, unless the state can demonstrate a compelling interest in its prohibition. It has further argued, and the District Court and the Circuit Court have agreed, that the state has not demonstrated such a compelling interest.

Amici respectfully contend, however, that appellee and the courts below have erred in their reading of the decisions of this Court which are relevant here. *Marchioro v. Chaney, supra*, and other cases have clearly established a guide for reconciling the power of the state to regulate elections and the right of party members to associate freely for expressive purposes. The principle of this Court's line of decisions is that a court must first determine if there has been a "substantial infringement" of the right to associate. If so, has the state demonstrated a compelling interest in its regulation? If not, has the state demonstrated a legitimate interest in its regulation?

This Court, moreover, has given explicit guidance as to the criteria which determine if there has been a "significant burden" on the freedom of association. Is the association prevented from attracting new members to its ranks, freezing the political status quo? Is the association forced to accept members it does not desire? Are internal, non-electoral procedures and decisions of the party regulated? Is the association a purely private one, distinguished by its smallness and high degree of selectivity? Does the regulation of the state have an extra-territorial reach, regulating a national association by rules which may be changed only by a small portion of those affected by those rules?

In this case, none of the criteria established by this Court has been satisfied. The Republican Party is *not* prevented from attracting new members. It is *not* forced to accept members it does not desire. Connecticut does *not* regulate the Party's internal aspects. The Party is *not* a purely private association. Connecticut's regulations do *not* attempt to override rules of the national Republican Party; indeed, those rules themselves provide that in case of conflict, state law shall govern. There is accordingly no "substantial burden" on the Party's freedom of association.

Because such a significant infringement does not exist, Connecticut need only demonstrate a legitimate interest in its regulation. Again, this Court and other courts have provided guidance concerning what interests may be recognized as legitimate. A state may act to protect the integrity of the electoral process. It may aim to protect the cohesiveness of political parties, and to protect the expression of their members' views from distortion by intruders.

Because Connecticut has demonstrated the legitimacy of its interest, amici respectfully contend that the Connecticut statute in question is constitutional. This Court should reverse the decision of the Circuit Court of Appeals.

Respectfully submitted,

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No. 85-766

UNITED STATES SUPREME COURT
October Term, 1985

JULIA TASHJIAN, Secretary of State of the State of Connecticut,
Defendant-Appellant,

V.

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.
Plaintiffs-Appellees.

Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICI CURIAE SEEKING AFFIRMANCE

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QUESTION PRESENTED

The question to be answered by this Court is whether a political party is entitled to decide the basis on which to make its appeal to the public.

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QUESTION PRESENTED

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CONSENT TO FILE BRIEF AMICI CURIAE

Both parties have consented to the filing of the annexed brief. Their letters are included below in Appendix A.

INTEREST OF THE AMICI

Amici Burns, Burrell, Crotty, Hedges and Jackson participated in the case below pursuant to an invitation from the District Court. They submitted briefs to both the District Court and the Court of Appeals, and, through counsel, took part in oral argument before the District Court.

All of the amici are specialists in the study of political parties.

James MacGregor Burns is Woodrow Wilson Professor of Political Science, Williams College. Professor Burns won the Pulitzer Prize in history in 1971.

Barbara Burrell is Visiting Lecturer

in Political Science at the College of the Holy Cross.

William Crotty is Professor of Political Science, Northwestern University. He is currently serving as the President of the Political Organizations and Parties Section of the American Political Science Association.

James S. Fay is Professor of Political Science, California State University, Hayward, Adjunct Professor of Law, University of San Francisco School of Law and Adjunct Assistant Professor of Law, Hastings College of Law.

Roman B. Hedges is Associate Professor of Political Science, Graduate School of Public Affairs, State University of New York at Albany.

John S. Jackson, III, is Dean of the College of Liberal Arts and Professor of Political Science, Southern Illinois

University at Carbondale.

Everett C. Ladd is President, Roper Center for Public Opinion Research, Director, Institute for Social Inquiry and Professor of Political Science, University of Connecticut.

Kay Lawson is Professor of Political Science, San Francisco State University and Associate Editor of the Western Political Quarterly.

Gerald M. Pomper is Professor of Political Science and Director of the Center on Political Parties, Eagleton Institute, Rutgers University.

A full description of their qualifications including their work on political parties may be found in Appendix B.

Amici include political scientists who are well known for diverse perspectives on the best form of primary

election. They wish to emphasize that in participating in this litigation as friends of the Court, they take no position on what rules the Republican Party of Connecticut ought to adopt and on that issue might well disagree among themselves.

Their different perspectives, however, all lead to the shared conclusion that political parties can best contribute to American politics if permitted to steer their own courses. They think it important that, regardless of the personal preferences of the individual amici, the Republican Party have the right to make its own decision.

The amici offer this memorandum to the Court for two reasons: first, their conviction that the overriding issue is the ability of the political parties to choose the basis on which to seek the

support of the American public; and, second, their conviction that the Connecticut statute, Sec. 9-431 Conn. Gen. Stat., interferes with that choice and interferes with the advantages which political parties may offer to the American people.

SUMMARY OF ARGUMENT

The research of American political scientists confirms several conclusions which are surely obvious to any political professional:

- the definition of party membership affects the role that party can play in government.

- both broad and narrow definitions of party membership have important roles to play in enabling the parties to make significant contributions.

- but those choices are not

fungible, they do not lead to a tweedledum-tweedledee standoff.

- instead those choices are each significant at different times and for different purposes.

Thus the parties must be free to take both choices.

An examination of the purposes of the first amendment confirms that view. It makes clear that both broadly inclusive and narrowly exclusive versions of political organizations were anticipated and protected, that the founders understood the significance of both types of political organizations and sought to encompass both rather than to choose between them. That examination of the purposes of the first amendment also makes clear that both broadly inclusive and narrowly cohesive types of political organization are central to the first

amendment objectives of control over government officials and control over policy choices.

The parties are entitled to decide for themselves.

ARGUMENT

I. FINDINGS OF POLITICAL SCIENCE INDICATE THAT THE RIGHT OF A POLITICAL PARTY TO CHOOSE ITS INTERNAL STRUCTURE FURTHERS THE PURPOSES OF THE FIRST AMENDMENT

The fundamental objectives of the freedoms of speech, press, petition, assembly and association, were to assist the people in self government and to permit the people to thwart the abuse of power by their elected and appointed leaders. Given those purposes, the findings of political science support a reading of the first amendment which would protect the right of political

parties to choose their own structure. Reading the first amendment to deny political parties the right to choose their own structure would frustrate the purposes of the first amendment.

A. THE PARTY IS THE BEST REPOSITORY FOR DECISIONS ABOUT ITS FUTURE

Political parties compete for the opportunity to govern. Elected officials belong to parties as do their challengers. Conflict of interest among the parties, and between elected bodies and political parties is inherent in a healthy political struggle. To give the party in power control over the structure of its opponents undermines the ability of the latter to make its best contribution to our political process. See, e.g., G. Jacobson, Money in Congressional Elections 163-200 (1980). That conflict of interest is certainly

inherent in the decision about who can vote in the opposing party primary. Thus making that decision by legislation rather than party rule, affords immense opportunities to thwart the attempt of the party out of power to set its own agenda and make its most useful contribution to political discussion.

B. THE IMPORTANCE OF THE PARTY'S RIGHT TO CHOOSE

Eliminating a party's choice of its own internal structure deprives it of the opportunity to shape its own political agenda and therefore to engage in the political dialogue in the most useful way. The ability to shape a political agenda is crucial to the parties' roles as collective instruments of first amendment protected speech. See J. Burns, The Power to Lead, 143-45, 235 (1984) (parties serve the public by

offering choices).

The value of a party's ability to shape its own structure and agenda would be equally offended whichever rule Connecticut required. The appropriate solution to questions of political party structure depends on contextual questions of time, place and political objective. As the succeeding sections will develope, both the structure mandated by Connecticut law and the structure desired by the Republican Party are valid and important solutions to different and difficult political questions. Freedom of choice for the parties, therefore, contributes to the political debate and electoral choice.

It is fundamental to the first amendment that there is no fixed immutable truth, no one position that parties may be expected to expound

forever. Williams v. Rhodes, 393 U.S. 23, 31-32 (1968); Republican Party of the State of Connecticut v. Tashjian, 770 F. 2d 265, 284-85 (2 Cir. 1985). As circumstances change, the parties must be free to explore the political requisites of that period. See N. Polsby, Consequences of Party Reform, 183-85 (1983). Hence any legislation which denies to parties the opportunity to make a political choice which affects the message which it can espouse to the public - its nominations and platforms and all that parties stand for - impoverishes public discourse.

1. The membership definition makes a difference.

It should be made explicit that including or excluding independents from the primary electorate does make a difference. Independent voters do not

merely duplicate the views of the party faithful. See David Adamany, Crossover Voting and the Democratic Party's Reform Rules, 70 Am. Pol. Sci. Rev. 536 (1976); Austin Ranney, Turnout and Representation in Presidential Primary Elections, 66 Am. Pol. Sci. Rev. 21, 33 Tables 8 and 9 (1972); Ronald Hedlund, Crossover Voting in a 1976 Open Presidential Primary, 41 Pub. Opinion Q 498, 502-04 (1977-78); Hedlund, Watts and Hedge, Voting in an Open Primary, 10 Am. Pol. Q. 197-218 (1982). Hence the decision affects the party's agenda - its nomination and platform.

2. Part of the debate; not just a mechanism.

Second, it should also be made explicit that parties do more than help to make the ballot manageable. Party nominations also continue to be

persuasive with a large percent of the electorate. See N. Nie, S. Verba & J. Petrocik, The Changing American Voter 47-73 (enlarged ed. 1979). On the contributions of political parties to the political debate see G. Pomper, The Contribution of Political Parties to American Democracy, in G. Pomper, Party Renewal in America, 5-10 (1980); J. Kirkpatrick, Dismantling the Parties, 5 (1978); Gottlieb, Rebuilding the Right of Association: the right to hold a convention as a test case, 11 Hofstra L. Rev. 191, 208-21 (1982).

Hence the parties are not merely voting machinery. Endorsements of parties and their predecessors have been an important part of the political debate since the founding of the Republic. See F. Dallinger, Nominations for Elective Office in the United States 1-13, 21, 26

(1897); Cunningham, The Jeffersonian Republican Party, in 1 History of United States Political Parties 239, 241-43 (A. Schlesinger, Jr. ed. 1973); J. Charles, The Origins of the American Party System 83-84 (1956); and Gottlieb, Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case, 11 Hofstra L. Rev. 191, 194-95 (1982).

3. Circumstances are crucial.

Third, there is a time and place for different strategies regarding who should vote in a primary and therefore how the party's political agenda will be shaped. For the parties to play a role in vigorous political debate they must be free to define their own political agendas.

The Republican Party of the State of Connecticut is plainly basing its position on the conviction that the

independent voters in Connecticut are in the center of the political spectrum and on the desire to frame an appeal to those voters. The discussion below, describing the strategies appropriate to varying political goals, is based on those assumptions. If the distribution of political positions among Connecticut voters differed from the assumptions embodied in the Republican Party rule, the specific tools that the Republican Party would use to appeal to moderate voters would differ from those assumed below. The first amendment argument made herein would not differ, however, since the Party would still have a valid and important choice to make. Indeed it is central to the argument herein that the choice of political structures is contextual rather than immutable.

The public also has choices to make.

It is surely legitimate for the public to decide as it sometimes does that the "traditional politics" have not worked and that more programmatic or ideological candidates and policies are necessary and appropriate. The public is similarly entitled to conclude that the greater danger comes from politicians on the "extremes" and deliberately steer a more moderate course. Moreover it is entitled to decide that either choice at a given moment is more or less important than other political goals.

At present there are significant debates both in Connecticut and elsewhere about where on the political spectrum the public does or should choose to locate itself. See Jewell, Political Parties, Courts, and the Nominating Process (paper presented at the annual meeting of the Southern Political Science Association,

Nashville, TN, November 7-9, 1985).

These choices are implicated by the party primary rules in ways which the following sections seek to describe.

a. When the public needs "a choice, not an echo."

If the parties perceive a public need to make clearer ideological choices, or a public distaste for the similarity in posture that the parties sometimes take, then a closed primary may prove preferable. See V. O. Key, American State Politics, 165-96 (1956).

The Connecticut statute facilitates that type of policy choice by defining and narrowing the base of political support attracted by the parties. A more narrowly defined portion of the electorate is more able to reach agreement on policies which can in turn be stated more concretely for the

"believers". A nomination based on that kind of primary contest will tend to present a clearer picture to the general electorate than one emerging from a more broadly based primary. By clarifying positions this approach serves the process of public discussion protected by the first amendment and allows the public greater control over the policies pursued by the government, certainly one of the objects of the first amendment. See American Political Science Association, Committee on Political Parties, Toward a More Responsible Two-Party System (1951)(for the classic statement of this view).

Whether these are advantages, however, depends on one's political goals. Closed primaries can result in major swings between political extremes or a long period of one party dominance.

See William Goodman, The Party System in America, 183-228 (1980). Voters are entitled, therefore, to see the advantages of closed primaries as contextual.

b. When the public needs compromise and competition.

If what the public needs is a more competitive political system when one party has dominated the state, or a more moderate politics in the face of political extremism, then a more broadly defined primary electorate may prove more appropriate to those purposes. The right of parties to act as the advocate of that need is also central to the functions of the first amendment - allowing the people, through public discussion, to determine what best suits their interests.

The approach of the Republican Party

is better suited to those objectives by broadening the definition of the primary electorate. A broader primary electorate allows more of the public to participate in political decisionmaking, allows the parties to broaden their base, to move closer toward the center of the political spectrum and for those reasons to generate a stronger challenge to the opposing party or the party in power. See William Crotty, In Favor of the Status Quo, in Presidential Selection 15 (F. Havelick, ed., 1981).

Whether these are advantages is contextual. By offering alternatives that are within the bounds the public considers acceptable, this approach may give the public a better choice among candidates and therefore allow the public to increase its control over who holds public office. This approach, however,

may sacrifice public choice of policy since it may bring the parties closer together and positions may be more vaguely stated. Thus a broadly defined primary electorate tends to decrease the likelihood of ideological change at the same time that it is likely to make elections more competitive and the victors more centrist.

A centrist position and the organizational basis to generate it are clearly legitimate options. The purposes of the first amendment in allowing the public to discuss and coalesce around those election decisions most desired are thwarted when the parties are frustrated in their effort to advocate a centrist position in the general election campaign as a result of the primary election process.

The broader definition of the

primary electorate is important for another reason which reflects the arithmetic of primaries. Each primary reflects some proportion of the voters. Even assuming that the parties split the electorate in half and that everyone votes, winning the party primary is within the control of just over 50% of the party faithful but only 25% of the general electorate. Candidates much more acceptable to the majority of the general electorate may be unable to muster a majority in the primary of either party because of the division of their supporters among the parties, the opportunity for competing candidates to appeal to ideological extremes within both primaries, see S. Brams, The Presidential Election Game, 13-25 (1978) and the unrepresentativesness of the primary electorate, see Nelson Polsby,

Consequences of Party Reform, 159-163 (1983).

The arithmetic of the primary nomination process just described induces a certain distancing of political stands from the middle ground which presumably represents the majority of the public. The result is frequently to present the public in the general election with a choice among candidates and platforms more acceptable to minorities of the population than to the majority.

The purpose of the first amendment in fostering discussion that developes what the public most needs and desires is thus thwarted by legislation which requires a narrow definition of the primary electorate. It also produces a certain amount of duplicity because candidates chosen on the basis of the satisfaction of a portion of the

electorate must now compete for a majority of the entire electorate in the general election. The further apart the primary electorates of the two major parties the more extreme these consequences are likely to be. Conversely the more the primary electorates overlap or the more the parties are permitted to appeal to the independent voters in the primary process the less extreme these consequences will prove.

That separation toward the extremes of the political spectrum can have very good results. We do not denigrate the importance of the clarity it provides, the opportunity for a political movement to state its case to the public in clear terms. Both versions create benefits and sacrifices for the general public which in turn should be allowed to decide for

itself what kind of politics it needs.

c. Both policies have their moment.

In other words, though reality is quite complex and the implications are not always realized, in general the tendency of these two models is a classic confrontation between stability and change, between a primary system driven by cohesive minorities and one driven by broader coalitions.

In a time when the public needs "a choice, not an echo" then a narrow definition of the eligible primary voters may prove appropriate. In a time when the public needs an opportunity to pull together, to achieve a broad definition of their common ground, to accomplish common objectives or to vote out the "bad guys" then a broad definition of primary voters may prove appropriate.

That ability to discuss political

choices necessary and appropriate for the time and situation is what the electoral process and rights of speech, press, assembly and association are all about.

C. LEGISLATION INHIBITS THAT CHOICE

By means of its definition of primary voters, the State of Connecticut is in effect restricting the opportunity of the voters to achieve a more competitive two party system. The voters of Connecticut may legitimately view other objectives as more important than competitive politics or the opportunity to participate in shaping the political system through the primary. They may decide that they need and want a clearer vision of the policies than the candidates wish to pursue. And they may reward a party which bends its efforts to present that vision. But they need not. In requiring that the parties accept a

narrow definition of primaries, the State of Connecticut denies them a tool to accomplish that objective of competitive, participatory politics.

The public cannot have the benefits of this choice through legislation which requires the parties to accept one model or another.

If the objective is to form a new majority coalition, the objective of those in office is necessarily to prevent it. If the objective of the party out of power is best served by a broad definition of their own membership which permits an appeal to a majority, then the objective of the party in power must be to require a narrow definition of primary voter which emphasizes the differences between the parties and inhibits the formation of that coalition.

Conversely, if the objective is to

clarify for the public the differences between the parties so that a mandate for a given policy can be derived, the objective of those in office may be to avoid that mandate. That may be best accomplished by retaining a broad definition of the primary electorate which will find it harder to attain clarity in their nomination.

These are political questions, not in relation to the separation of powers, as the termed is often used, see Baker v. Carr, 369 U.S. 186 (1962), but in the sense in which the first amendment protects the independence of the public in making political choices.

Hence there is an important value in recognizing the right of the parties to make their own choices. They will be rewarded for offering the public that approach which will make them most

competitive. They will be penalized for any approach which costs them elections. Thus the parties have a strong incentive toward organizing themselves in the way which serves the public best.

Legislation inhibits that choice for another reason. There is no necessary reason why the objectives of the two parties must coincide. One party may think it most important to give the public a clear choice. The other may think it most important to try to develope a coalition large enough to attract a majority and govern effectively. It is appropriate for the public to choose at the polls. When the parties are pursuing different strategies, each with the objective of appealing to the electorate, restricting one of those strategies restricts the choice presented to the public.

D. THE BEST SOLUTION

Thus the best solution is to recognize the right of each party to structure itself in the way it believes it will be most useful and therefore most acceptable to the citizens of the State.

II. FIRST AMENDMENT HISTORY AND DOCTRINE CONFIRMS THE RIGHT OF POLITICAL PARTIES TO DECIDE THEIR INTERNAL STRUCTURE

The Courts below agreed that the critical issue is the right of the parties to choose the basis on which to seek the support of the American public. The Court of Appeals framed the issue as who should decide the type of primary, Republican Party of the State of Connecticut v. Tashjian, 770 F. 2d 265, 281 (2 Cir. 1985). At another point it stated flatly that the question is not which type of primary is best but whether

there is a compelling interest in regulation), id. at 284-85. See also the opinion of the District Court, 599 F. Supp. 1228, 1239-40 and see id., 1240, note 28. The sections below will elaborate why the fundamental first amendment issue is the right of choice and why the asserted governmental interests are not legitimate, let alone compelling.

A. The Judicial Trend Toward Recognizing Party Rights

The courts originally sanctioned the definition of party membership in primary laws with little understanding of the impact of those laws on the parties - indeed the courts thought that the state legislatures were doing the parties a favor in establishing primaries. See Gottlieb, Rebuilding the Right of Association: the right to hold a

convention as a test case, 11 Hofstra L. Rev. 191, 198 (1982). Recent cases have continued to justify closed primary rules on the basis of protecting party integrity. Rosario v. Rockefeller, 410 U.S. 752 (1973); Kusper v. Pontikes, 414 U.S. 51 (1973).

More recently however this Court has recognized the importance to the party of defining its own membership. In Democratic Party of the United States v. Wisconsi ex rel La Follette, 450 U.S. 107 (19 the Court held that the state could not impose an open primary on an unwilling national party. See also Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14 (1982)(party "not required to include nonmembers in what can be analogized to a party primary", citing La Follette.)

La Follette thus points two ways.

On the one hand it supports the right of the party to make its own membership decision. On the other hand it underscores the preference for a narrower definition of membership.

La Follette is also somewhat ambiguous because of the fact that it balances state interests with the competing interests of a national party.

The ambiguity of the Court's prior decisions, however, should be resolved in plaintiffs' favor in light of the principles which underlie interpretation of the right of association protected by the first amendment. Thus the Massachusetts Supreme Court has concluded that the La Follette decision more properly stands for the supremacy of the right of association than for concerns with federalism. Opinion of the Justices, 385 Mass. 1201, 1207-08, 434

NE2d 960, 963-64 (1982) and see Bellotti v. Connolly, 460 U.S. 1057, 1058-61 (1983) (Stevens, dissenting). See also Cousins v. Wigoda, 419 U.S. 477 (1975); and compare Ripon Society v. National Republican Party, 525 F. 2d 567 (D.C. Cir. 1975 (en banc), cert. den. 424 U.S. 933 (1976) with Seergy v. Kings County Republican County Committee, 459 F. 2d 308 (2d Cir. 1972)(on leaving the methods and formula for selection of convention delegates to the parties).

B. Fundamental objectives of the first amendment require that parties have a choice among nominating systems.

The first amendment has always been based on the assumption that the people should be able to choose who and what to listen to from among the various arguments and proponents of arguments. See Brandeis' eloquent opinion in Whitney

v. California, 274 U.S. 357, 375 (1927)(concurring op.):

> Those who won our independence believed. . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . .

Does the reliance that the first amendment places on the people's good sense somehow fail us with respect to parties? To answer that we must look still deeper, to the purposes of the amendment.

1. The Tasks of Self-Government Require that the Parties Have a Right to Choose.

Perhaps the most basic function of the first amendment is to permit a critical review of the work of public officials and the development, when appropriate, of the popular consensus necessary to change the occupants of statehouses and legislative halls. New York Times v. Sullivan, 376 U.S. 254, 275 (1964); Mills v. Alabama, 384 U.S. 214, 219 (1966); and see New York Times v. United States, 403 U.S. 713, 717 (1971)(Black, J.). See V. Blasi, The Checking Value in First Amendment Analysis, 1977 Am. Bar Found. Res. J. 521, 523-67.

More broadly, the first amendment was and is intended to permit the public to govern itself by conducting a critical

examination of all choices of policy and personnel affected by the election process. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

Any interpretation of the first amendment which restricts the ability of the people to carry on the functions of self-government and oversight strikes at the very heart of the first amendment.

a. Conflict of Interest

When elected officials with partisan ties are permitted to govern the structure of the party out of power, the lure of political self-interest threatens the purposes of the first amendment and the ability of the outparty to offer the public an alternative. See Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980).

b. The values of choice.

The tasks of self-government require

both the kind of cohesive political organization which Connecticut seeks to protect and the more inclusive political organization which the plaintiff Republican Party seeks to develope. See Republican Party v. Tashjian, 770 F. 2d 265, 284; id. at 286 (Oakes, concurring).

i. The need to be able to choose cohesive parties.

The people may need to restrict primary voting to the party faithful in order to sharpen the political debate at a time when the similarity of the two parties prevents the public from taking control at the polls. Without that control at the polls, the public cannot effectively penalize officeholders who fail to live up to their trust, or effectively exercise the right of self-government.

The first amendment framers, though

ordinarily portrayed as fearing "faction", also recognized the importance of cohesive types of political organization for the health of the body politic. See J. Madison, The Federalist No. 10. Although the men who shaped the first amendment did not discuss its terms in any detail, they recognized organizations and forms of representation which were "close to the people" as a necessary building bloc of political organization. G. Wood, The Creation of the American Republic, 1776-1787 at 319-28 (describing the power and ubiquity of popular resort to nongovernment associations which clearly were "factions" and yet which formed an honored part of the history of the rights of speech, assembly and association); id. at 189-96 (describing the importance in the eighteenth century mind of

delegates' actual representation of the felt interests of their areas). Without this closeness to the people it is impossible to account for and consider their needs and shape the larger policies required of the infant republic. 1 M. Farrand, The Records of the Federal Convention, 48-50, 56, 185 (Mason, Madison and Wilson arguing that representatives should speak the language of their constituents and mirror their views) and J. Madison, The Federalist No. 56 (on the need for a sufficient closeness to permit knowledge of each geographic area.)

ii. The need to be able to choose inclusive parties.

The people may need to open primary voting to the crucial independent voters in order to include the common interests and political preferences of a majority

of the public in a party's proposals (its platform and nominations). Without the ability to unite behind common interests their ability to exercise the right of self-government is compromised.

The need to identify common goals is inherent in the recognition of the right to assemble. U.S. Const., Amend. I. Those who wrote the Constitution spoke eloquently about the need to encourage a breadth of view in addition and to counterbalance a more parochial approach to political issues. James Madison, The Federalist No. 10. And it was quite clear that they recognized the decisive principle of majority rule, see U.S. Const., Art I, sec. 2, cls. 1 and 3; id. sec. 4; 1 M. Farrand, The Records of the Federal Convention 133, 141 (Wilson); 2 id. 487, 488, 490 (Elseworth and Franklin), preferred majority rule to

faction and sought that blending and compromising of views which the Connecticut statute makes difficult since it requires the parties to narrow their appeals to what the founders would have thought of as "factions."

The people may need to open primary voting to the crucial independent voters in order to unite in opposition to a political establishment or one party rule. Without the ability to unite in opposition, the public may be unable to check the abuses of elected officials.

To the framers, tyranny was the central fear. See Madison, The Federalist No. 47 and G. Wood, The Creation of the American Republic, 1776-1787 18-28. We tend to use milder language but the task remains. The first amendment was designed to allow the people to talk about and unite about

challenging unsuitable governors. The position of the Republican Party can serve this interest.

Thus whether the legislature chooses a limited partisan electorate or chooses a broad invitation to independents in the primary, its choice may reduce the ability of the people to control their government.

2. A Robust Marketplace of ideas Requires that the Parties Have the Right to Choose their own Nominating Systems.

In addition to self-government and oversight of the activities of public officials, this Court has also described the purpose of the first amendment as protecting an uninhibited marketplace of ideas. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969).

Rather than encouraging a

marketplace of ideas, restriction on party organization restricts the consideration and ultimate presentation of points of view embedded in its nominations, platform and campaign. Candidates must consider the relevant electorate in designing their positions and appeals. Thus differently constructed parties are likely to call forth different arguments and positions. See Aranson and Ordeshook, Spatial Strategies for Sequential Elections, in Niemi and Weisberg, Probability Models of Collective Decision Making (1972). Moreover, as different party electorates would make different choices, the party would come to stand and argue for different political solutions to public problems. See V. O. Key, American State Politics, 165-96 (1956). Hence restricting a mechanism of party

decisionmaking results in restricting the form of political expression based on it.

3. Neutrality among Speakers and Positions Requires that Parties Have a Right to Choose.

This Court has often held that the government must not take sides with respect to speech. Clark v. Community for Creative Non Violence, 468 U.S. 288, ___, S. Ct. 3065 at 3069, 3070 (1984)(applied to demonstrators); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)(applied to corporate commercial speech); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (applied to inserts in utility bills). Police Dept. of the City of Chicago v. Mosely, 408 U.S. 92 (1972)(picketing of a school). In Cox v. Louisiana, 379 US 536, 557-58 (1965), after noting that "It is clearly

unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not," the Court added alternatively "or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." Cox illustrates the close connection between speakers and positions; ideas can be inhibited by barring designated speakers as well as by direct censorship of the positions involved.

This Court has made exceptions to the rule of neutrality in the cases where government selectively grants what the Court has termed a "privilege" and in cases involving the government's own

speech. Regan v. Taxation with Representation, 461 U.S. 540 (1983). Neither exception is applicable here. Far from extending the parties a privilege, the primary laws make a major incursion into the liberty of the parties. Nor can the presentation of the Republican Party be considered government speech. See Democratic Party of the United States v. Wisconsin ex rel La Follette, above. If it were government speech, the government would be entitled to decide what it wanted to say. The consequences of such a doctrine would, of course, collapse all campaign speech into government speech and give government the privilege of censorship of political campaigns which the first amendment denies. Thus the obligation of neutrality applies.

Yet the definition of the primary

electorate is not neutral among speakers. It announces that certain groups of people may speak with one voice while others may not despite the express wishes of the parties involved. Because the structure of political association is intimately related to its message, official choice among types of association restricts their message and thus strikes at the heart of free speech, assembly and association.

Hence none of the current approaches to interpreting the first amendment permits this kind of legislative intrusion into the rights of political parties.

C. THE FIRST AMENDMENT PROTECTS ASSOCIATIONS AS THE MECHANISM OF THIS CHOICE

The first amendment must be read to protect effective political speech. That

is plain from the founders' purposes, as discussed above, and from their choice of language. For them speech was not an exercise in self-indulgence. It was engaged in to promote the most serious forms of statecraft. See New York Times v. Sullivan, above. Similarly, the right of assembly was provided not merely to satisfy the desire of people to hang out on the public square but because it was through the organization of the public that the people could work its will on its representatives. See Gottlieb, above, 11 Hofstra at 194-96.

The scope of the right of association as a derivative of the speech, assembly and petition clauses, see N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958), must be understood to accomplish the objective of assisting the public in its political chores.

The tasks of identifying, organizing and promoting policy choices and the task of uniting the people behind a common program cannot be handled effectively without political parties free to assist.

It is not enough that someone speaking for himself or herself could propose a candidate or make a point similar to what the Republican Party would make if allowed. No other person or group could demonstrate the support for those decisions that a party like the Republican Party could.

President Van Buren urged programmatic parties. He urged members of both parties to support a vigorous two party system in preference to the one party or nonpartisan system he had inherited because the people had lost their voice to the nineteenth century version of what we call special

interests. He saw the need for a competing party in order to differentiate real partisans from their opponents. See James Ceaser, Presidential Selection, 126, 131-32 (1979) and Martin Van Buren, Inquiry into the Origin and Course of Political Parties in the United States, 6, 226 (1967). The cohesion that Van Buren saw as necessary to give voice to the people must take place through association.

The same is also true for majority rule. Some mechanism is necessary to enlarge and refine the public views about political questions. See Madison, The Federalist No. 10. The Convention in 1787 used the selection of senators by state legislatures, U.S. Const. Art. I, sec. 3, and the selection of the president by electors, Art II, sec. 1, as means to mediate between the important

but unrefined views of the public and the selection of public officials. When the method of selecting senators changed to popular vote by the seventeenth amendment the parties had succeeded to that role as the intermediate agency. Absent some such mechanism only special interests and a welter of individual views would remain.

In order to discern a popular majority it is necessary to have some mechanism for proposing to that potential majority what it might agree on and then determining whether it will in fact accept the proposal. The parties came into being to assist in that task. Connecticut requires the parties to do that in the primaries. Conn. Gen. Stat. 9-400. Hence, if candidates acceptable to a broad portion of the Connecticut electorate are to be placed on the ballot

it is necessary for the parties to be permitted to develope such candidates.

It makes a considerable difference whether the organization is able to communicate with its membership and its intended audience and determine a common choice or merely guess at the results. If it cannot communicate with its intended audience in order to incorporate their preferences but must nominate on the basis of some other audience, then the results of that nomination process will be skewed in the direction of the group included within the franchise. Nor is it sufficient to be able to say that so-and-so is the person most likely to be acceptable to a majority if that proposition cannot be tested. Thus the way the party is defined will prove crucial. See Brams, above, and Aranson and Ordeshook, above. If the government

of Connecticut can define the party it will be able to limit the way the party can serve the public, especially in the ways its membership believes most crucial.

Connecticut of course could permit people to enter a voting booth and enter their preference in a variety of ways. But the preference they have provided for here governs the activities not merely of election officials who must print names on a ballot but also of a political party - an organization of long standing, with traditions and loyalties, an organization with a unique place in Connecticut and indeed in every state in which it is organized, one which cannot easily and has not been replaced by some other organization as successor to those traditions and loyalties and therefore capable of doing the job that the

Republican Party can do in Connecticut. Since the State of Connecticut has in effect taken over the Republican Party in the primary it must in turn allow the Party to define who can vote in the Republican primary.

D. THE STATE DOES NOT HAVE A VALID INTEREST IN FOSTERING A PARTICULAR TYPE OF POLITICAL PARTY

In opposition to claims of a right of association the states in some cases have been able to claim a right to shape a manageable ballot. See Storer v. Brown, 415 U.S. 724, 736 (1974); Mandel v. Bradley, 432 U.S. 173, 177-78 (1977); but see Anderson v. Celebrezze, 460 U.S. 780 (1983). At issue in those cases were rules which limited the number of parties or candidates for which the ballot must be prepared.

In the instant case however there is

no such neutral or external issue. The controversy must center precisely on the nature of the associations which must, under the first amendment, be protected by the State of Connecticut.

Yet it should be clear from the foregoing that the State of Connecticut does not and can not have a legitimate interest in the type of association the state's Republicans choose to shape. See the opinions below, 770 F. 2d 265, 284 (2 Cir. 1985) and 599 F. Supp. 1228, 1239-40 (D. Conn. 1984). It is appropriate to shape the government to take account of the impact of faction on the one hand and of the need for cohesion on the other. It is not proper, however, to assert a government interest in controlling the public discussion of those same matters.

The Connecticut statute does just that by taking over the process by which

Connecticut Republicans get together and determine their preferences and then refusing to let them do so in common with the independent voters they intend to woo.

To assert such an interest is to assert that a public decision either to unite against particular officeholders on the one hand or to unite in support of given policies on the other is not legitimate and should be hindered. Yet as Madison told the House "the censorial power is in the people over the Government and not in the Government over the people." 3 Annals of Cong. 933, 934 (1794). The definition of the membership of political association is not a legitimate concern of the state.

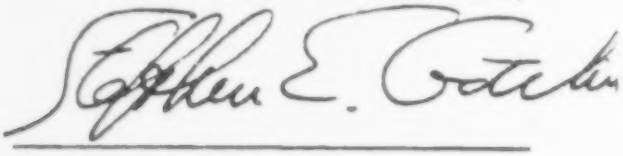
CONCLUSION

First amendment history and doctrine

confirm the findings of political scientists that freedom of speech and association are best served by protecting the right of political parties to choose their own internal structure.

The decision of the Court below should be affirmed.

Respectfully submitted,



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APPENDIX A

LETTERS OF CONSENT TO FILE BRIEF AS AMICI CURIAE

Letter of David S. Golub, Silver Golub & Sandak, counsel for plaintiffs-appellees, dated February 12, 1986.

Letter of Elliot F. Gerson, Special Assistant Attorney General, counsel for Defendant-Appellant, dated February 25, 1986.

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February 12, 1986

Stephen E. Gottlieb, Esq.
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80 New Scotland Avenue
Albany, New York 12208

RE: Julia H. Tashjian v. Republican Party of the State of Connecticut, et al
No. 85-766

Dear Mr. Gottlieb:

The appellees in the above matter consent to your filing an amicus brief in the pending Supreme Court appeal on behalf of the group of political scientists you represent.

Very truly yours,

DAVID S. GOLUB

DSG:MGJ

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

State of Connecticut

Office of The Attorney General
30 TRINITY STREET
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February 25, 1986

Professor Stephen Gottlieb
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

RE: Tashjian v. Republican Party, No. 85-766

Dear Professor Gottlieb:

This letter serves to indicate the consent of appellant to your filing an amicus brief in the above-captioned case.

Very truly yours,

Elliot F. Gerson
Special Assistant Attorney General
Counsel of Record for Appellant

EFG:HSC:cc

APPENDIX B

DESCRIPTION OF THE QUALIFICATIONS AND EXPERIENCE OF THE AMICI

JAMES MacGREGOR BURNS

Woodrow Wilson Professor of Political Science, Williams College.

Education: B. A., Williams College, 1939; Ph.D., Harvard University, 1947; London School of Economics, 1949.

Writings: THE POWER TO LEAD (1984); THE VINEYARD OF LIBERTY (1982); LEADERSHIP (1978); EDWARD KENNEDY AND THE CAMELOT LEGACY (1976); UNCOMMON SENSE (1972); ROOSEVELT: THE LION AND THE FOX (1956) and ROOSEVELT: THE SOLDIER OF FREEDOM (1970); PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP (1966); THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); CONGRESS ON TRIAL (1949). Author also (with Jack W. Peltason and Thomas E. Cronin) of a widely used American government college text since 1951, GOVERNMENT BY THE PEOPLE, and of numerous articles and

reviews in Harpers, The Atlantic, Life, Newsweek, The New York Times Magazine and its Book Review, etc.

Political: Has served in Democratic Party since 1936. Democratic nomineee for Congress, 1st Congressional District of Massachusetts, 1958. Delegate to 1952, 1956, 1960, 1964 Democratic national conventions. Delegate to National Charter Commission of the Democratic Party, Kansas City, 1974, and to Charter Commission of the Massachusetts Democratic Party, 1979.

Military: Combat historian, Pacific Theater, 1943-46; participated in invasions of Saipan, Guam, Okinawa. Wrote military histories of same. Awarded Bronze Star Medal and four Battle Stars.

Other activities: President, American Political Science Association,

1975-76; President, The International Society of Political Psychology, 1982-83. Co-chair (with Richard B. Morris) of Project 87. Chairman, Berkshire County Commission Against Discrimination, 1950s. Faculty, Salzburg Seminar in American Studies, 1954, 1961. Active in civil liberties, civil rights, and labor groups. Has lectured widely in the United States, Europe, the Soviet Union, and India.

Awards: Pulitzer Prize, National Book Award, Tamiment Prize, Francis Parkman Prize, Woodrow Wilson Prize for Roosevelt biographies. Sarah Josepha Hale Award, 1979, for general literary work. Christopher Award (for The Vineyard of Liberty), 1983.

BARBARA BURRELL

Visiting Lecturer, College of the Holy Cross, 1985-86.

Education and Experience: University of Michigan, Ph.D. 1982. Assistant Professor of Political Science, State University of New York at Albany, 1982-85. Prior positions include Visiting Instructor in Political Science at Vassar College, Instructor in Political Science at the University of Massachusetts, Boston, and the University of Michigan; researcher, Office of Institutional Policy Research on Women's Education at Harvard and Radcliffe (1978-81).

Writings: Professor Burrell's work on local parties and on the parties in Connecticut include: Local Political Party Committees, Task Performance, Western Political Quarterly (1986); A New Cleavage in the Democratic Party?: A

Comparison of Mondale and Hart Supporters at the Connecticut State Democratic Convention, Polity (with Carlson, forthcoming). She has presented papers on local political organization at the American Political Science Association (1986, 1984), the Midwest Political Science Association (1985 with Carlson, 1984 with Hutter and Schier, 1982), the Northeastern Political Science Association (1985, 1980) and on education and career development at the American Educational Research Association/Research on Women and Education Conference (1979) and the American Educational Research Association Convention (1981 with Bailey). Her other works include Women's and Men's Campaigns for the U.S. House of Representatives, 1972-1982: A Finance Gap? American Politics Quarterly (1985); A New Dimension in Political

Participation: The Women's Political Caucus in A Portrait of Marginality (M. Githens and J. Prestage, eds., 1977), book reviews in the American Political Science Review (1985) and Citizen Participation (1985).

Political: Office Manager, Congressman Tom Harkin, 5th district, Iowa (1974-75)

Other activities: Panelist, American Political Science Association (1981); workshop facilitator for Undergraduate Women Conference, Murray Research Center, Radcliffe College (1980)

Awards: Radcliffe College Research Support Program Grant (1984); Graduate School of Public Affairs Grant, State University of New York, 1983

WILLIAM CROTTY

Professor of Political Science, Northwestern University

Writings THE PARTY GAME (1985); PARTY REFORM (1983); DECISION FOR THE DEMOCRATS (1978); POLITICAL REFORM AND THE AMERICAN EXPERIMENT (1977); PRESIDENTIAL NOMINATING PROCEDURES, (2 vols., 1974). Co-author: AMERICAN PARTIES IN DECLINE (1980; 2nd ed. 1984); THE PARTY SYMBOL (editor 1980); PATHS TO POLITICAL REFORM (editor 1980); POLITICAL PARTIES AND POLITICAL BEHAVIOR (editor 1966, 1971); ASSASSINATIONS AND THE POLITICAL ORDER (editor 1972); ASSASSINATIONS AND POLITICAL VIOLENCE (1969, 1970); A METHODOLOGICAL PRIMER FOR POLITICAL SCIENTISTS (1969); PUBLIC OPINION AND POLITICS (editor and 1970); APPROACHES TO THE STUDY OF PARTY ORGANIZATION (editor and co-author,

1968). Numerous articles in journals including Commonsense, Policy Studies Journal, American Political Science Review, Comparative Political Studies, Western Political Quarterly, chapters in a number of collaborative works, and papers delivered before professional associations including the American and Midwest Political Science Associations, American Bar Association Conference on Presidential Selection, Southwestern Social Science Meeting, Social Science and History Association. Prepared reports for projects including the Study of the U.S. Presidential Selection Process, Vanderbilt University and the Sloan Foundation, 1983.

Political: Executive Director, consultant and member of various task forces and commissions of the Democratic National Committee; member, national

board (1980-81) and task force (1972), Americans for Democratic Action.

Other activities: President, Political Organizations and Parties Section, American Political Science Association, 1983- ; Executive Committee, Committee on Party Renewal, 1981-. Guest lecturer at numerous European and American universities including appearances as a guest of the Agency for International Development and the State Department. Guest Scholar, The Brookings Institute, Summer 1983; the Woodrow Wilson International Center for Scholars, Summer 1971. Member of commissions to observe Honduran and Argentine elections and human rights sponsored by government and private agencies. Consultant, Washington Office on Latin America; International Human Rights Law Group.

JAMES SYLVESTER FAY

Professor of Political Science, California State University, Hayward. Adjunct Professor of Law, University of San Francisco School of Law. Adjunct Assistant Professor of Law, University of California - Hastings College of Law

Education: B.A., Georgetown University, 1963; M.A., Graduate Faculty of the New School for Scoial Research, 1967; Ph. D., The University of Michigan, 1973; J.D. The University of California, Hastings College of Law, 1980.

Publications: The 1986-87 California Almanac (with A. Lipow and S. Fay, 1985); 1982 Directory - California Campaign Contributors (with A. Lipow 1982); The Legal Regulation of Political Parties, Journal of Legislation, vol. 9, no. 2 (Summer 1982); Restraints on Executive Emergency Powers in the United States and

Canada, Hastings International and Comparative Law Review (Winter 1980); Election Finance Laws: The Ambivalence of Reform, in Political Reform in California: Evaluation and Perspective (T. Leatherwood and A. Lipow, eds., 1978); Sunset on California Common Cause (with Arthur Lipow), California Journal (November 1977); Missing Billions in the Defense Budget, The Nation, March 12, 1977; The Right to Privacy, The Progressive (December 1976); A Seriously Flawed Election Finance Bill, Los Angeles Times, January 22, 1976; Public Funding of Political Campaigns: Attitudes and Issues in California (with Thomas Leatherwood), Public Affairs Report, vol. 16, no. 1 (February 1975); Changing Regulations: Campaign Finance in the Golden State, Public Affairs Report, vol. 15, no. 2, University of California,

Berkeley (April 1974); State Campaign Finance Laws--The Issue of Enforcement, National Civic Review (December 1973).

Military: First Lt., Army Intelligence, 1963-65.

ROMAN B. HEDGES

Associate Professor of Political Science, Guaduate School of Public Affairs, State University of New York at Albany

Writings: Co-authored articles on the voting rights acts, reapportionment, elections and political campaigns in the Western Political Quarterly (forthcoming 1987, 1984, 1981), Polity (1980), American Journal of Political Science (1980), American Politics Quarterly (1977); contributed reviews to the Annals of the American Academy of Political and Social Science (1984, 1983, 1981, 1980); presented papers to the American, Midwest, Northeast and Southern Political Science Associations; prepared reports for the New York State Department of Environmental Conservation, the National Science Foundation under contract with

the Research Foundation of the State of New York

Political: Consultant to the Legislative Advisory Task Force on Demographic Research and Reapportionment, consultant for Democratic Assembly Campaign Committee, area candidates and local television, and former candidate

Other activities: Member of New York State Management Study Research Team; representative of the State University of New York at Albany to the Inter-University Consortium for Political and Social Research, 1974-77; manuscript review for the American Journal of Political Science, American Politics Quarterly, Political Methodology, Polity (book reviews), Publius, Western Political Quarterly, Center for the Administration of Justice, Greenwood Press, and Little, Brown and Company.

JOHN S. JACKSON, III

Dean of the Liberal Arts College and Professor of Political Science, Southern Illinois University at Carbondale

Writings: PRESIDENTIAL PRIMARIES AND NOMINATIONS (with William Crotty, 1985); numerous articles both independently and with co-authors on parties and elections in professional journals including the Midwest Journal of Political Science (1971), Journal of Politics (1973, 1977), Western Political Quarterly (1973, 1981), Urban Affairs Quarterly (1973), American Politics Quarterly (1976, 1978, 1982), Polity (1979), Legislative Studies Quarterly (1979); various publications of divisions of the American Political Science Association; and chapters in books by Paul T. David, David H. Everson, Paul R. Dommel, Thomas J. Volgy, William Crotty, Stephen L. Wasby; papers

presented and panels chaired at meetings of the American, Midwest, Southern, and Southwestern Political Sciences Associations.

Political: Delegate and member of the Rules Committee, 1980 Democratic National Convention; member of the Executive Committee and Secretary, Jackson County Democratic Party; conducted survey research for U.S. Senator Alan Dixon and U.S. Congressman Paul Simon, campaign advisory staff for various campaigns of Illinois State Senator Kenneth Buzbee and Illinois State Representative Bruce Richmond .

Other activities: Member of the Editorial Board of the Journal of Politics (1982-85), American Politics Quarterly (1981-); officer of the Southern Political Science Association (1981-81), the Midwest Political Science

Association (1980), Illinois Association of Graduate Schools (1982-83), Illinois Political Science Association (1979-80); Research Associate, Brookings Institution (1975-79) and Woodrow Wilson School of Public and International Affairs, Princeton University (1979-81); consultant, University of Arkansas Medical School (1975-78)

Awards Pi Sigma Alpha Best Paper Award for 1979 Annual Meeting of the Southwest Political Science Association; second place, 1971 Prize Paper Competition, Midwest Political Science Association.

EVERETT CARLL LADD

Director of the Institute for Social Inqury at the University of Connecticut; Executive Director and President of the Roper Center for Public Opinion Research, a private, nonprofit research facility affiliated with the University of Connecticut since 1977; Professor of Political Science, the University of Connecticut.

Publications: THE AMERICAN POLITY: THE PEOPLE AND THEIR GOVERNMENT (1985); WHERE HAVE ALL THE VOTERS GONE?: THE FRACTURING OF AMERICA'S POLITICAL PARTIES (1978, 1982); TRANSFORMATIONS OF THE MAERICAN PARTY SYSTEM: POLITICAL COALITIONS FROM THE NEW DEAL TO THE 1970's (1975, 1978); THE DIVIDED ACADEMY: PROFESSORS AND POLITICS (1975, 1976 with S. M. Lipset); POLITICAL PARTIES AND POLITICAL ISSUES: PATTERNS IN

DIFFERENTIATION SINCE THE NEW DEAL (1973 with C. D. Hadley); ADADEMICS, POLITICS AND THE 1972 ELECTION (1973 with S. M. Lipset); AMERICAN POLITICAL PARTIES: SOCIAL CHANGE AND POLITICAL RESPONSE (1970); IDEOLOGY IN AMERICA: CHANGE AND RESPONSE IN A CITY, A SUBURB, AND A SMALL TOWN (1969, 1972, 1986); NEGRO POLITICAL LEADERSHIP IN THE SOUTH (1966, 1969).

His articles have appeared regularly in such magazines as Fortune, Public Opinion, Wall Street Journal, Christian Science Monitor, Newsday, New York Times, The Nation, The Public Interest, Commonsense, and Campaigns and Elections, and in such scholarly and professional journals as The Journal of the History of Ideas, Yale Review, American Journal of Sociology, Public Opinion Quarterly, Chronicle of Higher Education, Political Science Quarterly and The Wilson

Quarterly, among others, and numerous chapters in other books. He has delivered numerous papers at the meetings of the major professional associations including the American, Southern and International Political Science Associations, among others.

Additional Professional Activities: Adjunct Scholar of the American Enterprise Institute for Public Policy Research; member of the editorial boards of seven magazines, senior Editor of Public Opinion, Editorial Advisor in the Social Sciences to W. W. Norton. In recent years he has been a Fellow of the Ford, Guggenheim and Rockefeller Foundations, the Center for International Studies at Harvard, the Hoover Institution at Stanford, and the Center for Advanced Study in the Behavioral Sciences (Palo Alto, California). He has

also lectured widely at colleges and universities in the United States including West Point, Wisconsin, UCLA, Harvard and Yale, among many others.

KAY LAWSON

Professor of Political Science, San Francisco State University. Visiting Professor of Political Science, Columbia and Rutgers universities, Spring 1982

Publications: WHEN PARTIES FAIL: EMERGING ALTERNATIVE ORGANIZATIONS (co-edited with Peter Merkl, forthcoming); THE HUMAN POLITY: AN INTRODUCTION TO POLITICAL SCIENCE (1984); NEW DIRECTIONS FOR U.S. POLITICAL PARTIES (Public Affairs Report of the Institute of Governmental Studies, University of California, Berkeley, 1983); POLITICAL PARTIES AND LINKAGE: A COMPARATIVE PERSPECTIVE (editor, 1980); THE COMPARATIVE STUDY OF POLITICAL PARTIES (1976); POLITICAL PARTIES AND DEMOCRACY IN THE UNITED STATES (1968); articles and chapters in French Politics and Society (forthcoming 1986); J. of Law and

Politics (Fall 1985); CALIFORNIA POLICY CHOICES (J. Kirlin, ed., 1985); Comparative State Politics (1984); West European Politics (Summer 1983); CONSTITUTIONAL DEMOCRACY: ESSAYS IN COMPARATIVE POLITICS (F. Eidlin, ed., 1983); Newsday, October 10, 1982); Comparative Politics (July 1981); PARTY REFORM IN AMERICA: THEORY AND PRACTICE (G. Pomper, ed., 1980); THE DEVELOPMENT OF POLITICAL PARTIES (L. Maisel and J. Cooper, 1978); Journal of African Studies (Spring 1976); AMERICAN GOVERNMENT AND POLITICS (W. Moore, et al eds., 1971). Book reviews in the American Political Science Review, Journal of Politics, Annals of American Academy of Political and Social Science, Canadian Journal of Political Science, Perspective, among others. Presented papers to professional associations including the International

Studies Association, Southwestern Political Science Association, American Political Science Association, International Political Science Association, Chinese Society of Comparative Law; colloquia at Columbia, Yale, Rutgers, Princeton, Tufts and Harvard Universities and the University of Massachusetts; addresses given at Oxford University, the Fondation Nationale des Sciences Politiques, Paris, UCLA School of Law among other universities in addition to various presentations to community organizations, and over radio and television stations.

Other Activies: Associate Editor, Western Political Quarterly; served on various committees of the American Political Science Association; the Executive Council of the Western Political Science Association and the

Comparative Interdisciplinary Studies Section of the Intrnational Studies Association; Executive Board, African Studies Association; co-organizer of the Internet on International Comparative Analysis, International Studies Association

GERALD M. POMPER

Professor of Political Science and Director, Center on Political Parties, Eagleton Institute, Rutgers University, New Brunswick, NJ.

Publications: AMERICAN GOVERNMENT: THE POLITICS OF FRAGMENTATION (with Baker and McWilliams, 1983, 2nd ed. forthcoming); THE CHANGING POLITICS OF STATE MANAGEMENT (with Moakley, forthcoming); VOTERS' CHOICE: VARIETIES OF AMERICAN ELECTORAL BEHAVIOR (1975); ELECTIONS IN AMERICA: CONTROL AND INFLUENCE IN DEMOCRATIC POLITICS (with Lederman, 1968, 1980); AMERICAN PARTY POLITICS: ESSAYS AND READINGS (with Herzberg, 1966); NOMINATING THE PRESIDENT: THE POLITICS OF CONVENTION CHOICE (1963, rev. ed. 1966). Editor and Contributor of THE POLITICAL STATE OF NEW JERSEY (forthcoming); THE ELECTION OF

1984: REPORTS AND INTERPRETATIONS (1985); THE ELECTION OF 1980: REPORTS AND INTERPRETATIONS (1981); PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE (1980); THE ELECTION OF 1976: REPORTS AND INTERPRETATIONS (1977); THE PERFORMANCE OF AMERICAN GOVERNMENT: CHECKS AND MINUSES (1972).

His articles have appeared in American Behavioral Scientist, American Journal of Political Science, American Political Science Review, American Politics Quarterly, International Problems (Israel), Journal of Politics, Labor History, Midwest Journal of Political Science, Policy Studies Journal, Political Science Quarterly, Polity, P.S., Public Opinion Quarterly, Review of Politics, Sage Electoral Studies Yearbook, Society, Southwest Social Science Quarterly,

Transaction/Society, and Western Political Quarterly. Several have been reprinted. He has also contributed chapters to a large number of books by other scholars. He has delivered papers, chaired or participated on panels at the American, British, Western, Northeast, New York and New Jersey Political Science Associations, the British Association for American Studies, the Social Science History Association and lectured at the Universities of Essex, Keele, Kent, Leeds and Oxford.

Other Professional Activities: General Editor, Praeger Special Studies in Political Parties and Elections. Member of the Editorial Boards of theJournal of Politics, Safe Professional Papers in American Politics, Journal of American Studies (Cambridge). Lecturer, United States Information

Agency, 1985. Referee for the National Science Foundation, seven professional journals and various commercial and university publishers. Academic Visitor, Nuffield College, Oxford University, 1981-82. Fulbright-Hayes Visiting Professor, Tel Aviv University, 1971-72. Chair, Committee on Party Renewal. Member of the Advisory Committee, New Jersey State Democratic Committee since 1984, the Senior Political Science Election Committee of the Institute for International Education, 1982-85, Executive Committee, APSA Section on Political Organizations and Parties. Distinguished Service Award, New Jersey Political Science Association, 1980. Member, Board of Education, Highland Park, NJ.

CERTIFICATE OF SERVICE

Stephen E. Gottlieb, hereby certifies that on April 22, 1986, he mailed three copies of this amicus brief including all attachments and appendices to each party separately represented by mailing three copies each to David Golub, Silver Golub & Sandak, Post Office Box 389, Stamford, CT 06904, counsel of record for the plaintiffs-appellees, and three copies to Elliot F. Gerson, Special Assistant Attorney General, Office of the Attorney General, 30 Trinity Street, Hartford, CT 06106, counsel of record for defendant-appellant, first-class postage thereon fully prepaid.

Stephen E. Gottlieb

Counsel for Amici Curiae